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A SELECTION OF CASES AND  
OTHER AUTHORITIES

ON

CIVIL PROCEDURE  
IN ACTIONS AT LAW

BY

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## PREFACE

THIS collection of cases and other authorities is intended primarily for the use of students who are beginning the study of the law. About five years ago, when the editor began his work as a teacher of law in the Harvard Law School, he decided to enlarge the course on Pleading in that school into a course on Civil Procedure. It seemed that it would make the subject easier for the student to understand if he were shown how an action is carried through the courts, and if he were taught Pleading in its proper relation to the other steps in an action. In the selection and arrangement of the material, the editor has had in mind the needs of the first-year student who, though familiar in a general way with parts of the substantive law, has no knowledge of procedure except as he may have derived from the daily newspapers some notions of legal forensics. The cases cited in the footnotes are not for the most part merely cumulative. They are intended to suggest variations of the problems presented in the principal cases, and are adapted for use as hypothetical cases in the class-room.

The names and arguments of counsel have been omitted. Other omissions are duly indicated.

AUSTIN WAKEMAN SCOTT.

LAW SCHOOL OF HARVARD UNIVERSITY,  
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# CASES ON CIVIL PROCEDURE.

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## CHAPTER I.

### VENUE.

#### ACKERSON *v.* ERIE RAILWAY COMPANY.

SUPREME COURT OF NEW JERSEY. 1865.

[Reported 31 *New Jersey Law*, 309.]

THE CHIEF JUSTICE (Beasley).<sup>1</sup> This suit is in tort for an injury happening to the plaintiff from the carelessness of the defendants, while a passenger in their railroad cars. The declaration is in the usual form, and it has been answered by a demurrer. The point of this issue upon which a decision is sought is, whether the plaintiff, as he shows in his declaration, that the injuries received by him occurred in New York on the railroad of the defendants there situate, can sue on such cause of action in this state?

As long ago as 1665, it was certified by the twelve judges, that for torts to the person and to personal property done out of the realm, a remedy lay in a suit, *in personam*, in England; but that for torts to real property situate abroad, no suit would lie. Cited in *Mostyn v. Fabrigas*, Cowp. R. 180. A few years later it was decided in affirmance of this doctrine in the case of *Rafael v. Verelst*, 2 Wm. Black. 1055, that an action for an alleged unlawful imprisonment of the defendant in India was well brought, the court saying, in reply to the objection of want of jurisdiction, that "personal injuries are of a transitory nature and *sequuntur Forum Rei*." From the time of these decisions to the present, it is believed that the doctrine thus enunciated has never been called in question by any English judge.

Nor does the rule of the common law differ in this respect, with that which is enforced in the law of nations. It is, in the international code, the well established doctrine, that every nation may

<sup>1</sup> The statement of facts and the concurring opinion of Haines, J., are omitted. — Ed.

rightfully exercise jurisdiction over all persons within its domains, with regard to matters purely personal; and Judge Story remarks that, in England and America, "suits are maintainable and are constantly maintained between foreigners, where either of them is within the territory of the state in which the suit is brought." *Confl. of Laws*, § 542.

The same view of the law received judicial sanction in the following cases. *Glen v. Hodges*, 9 Johns. 67; *Gardiner v. Thomas*, 14 Johns. 134; *Flower v. Allen*, 5 Cow. 654; *Smith v. Bull*, 17 Wend. 324; *Barrell v. Benjamin*, 15 Mass. 354.

And in this state, it is believed, the practice has accorded with the doctrine illustrated by the cases above cited. If the point had been considered as at all in doubt, it is highly improbable that it would have escaped the attention of the experienced counsel who acted for the defence, in the important case of *The American Print Works v. Lawrence*, 1 Zab. 248.

The plaintiff is entitled to judgment on this demurrer.<sup>1</sup>

<sup>1</sup> The result is the same where the cause of action is statutory. *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. ed. 439; *Texas & Pacific Ry. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829, 12 S. Ct. 905; *Burns v. G. R. & I. R. R. Co.*, 113 Ind. 169, 15 N. E. 230; *Higgins v. Central, etc., R. R. Co.*, 155 Mass. 176, 29 N. E. 534; *McLeod v. Conn. & Pass. R. R. Co.*, 58 Vt. 727, 6 Atl. 648; *Nelson v. C. & O. R. R. Co.*, 88 Va. 971, 14 S. E. 838. But compare *Mexican National Ry. Co. v. Jackson*, 89 Tex. 107, 33 S. W. 857, 31 L. R. A. 276; *De Herrera v. Texas, Mexican Ry. Co.* (Tex. Civ. App., 1913), 154 S. W. 594.

The mere fact that one party is a non-resident individual or corporation, or that both parties are non-resident individuals or corporations, does not preclude a recovery. *Rafael v. Verelst*, 2 Wm. Bl. 1055; *Reeves v. Southern Ry. Co.*, 121 Ga. 561, 49 S. E. 674, 70 L. R. A. 513; *Rice v. Brown*, 81 Me. 56, 16 Atl. 334; *Peabody v. Hamilton*, 106 Mass. 217; *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 22 So. 53; *Wertheim v. Clergue*, 53 N. Y. App. Div. 122, 65 N. Y. Supp. 750. But see *Matthaei v. Galitzin*, L. R. 18 Eq. 340; *Gardner v. Thomas*, 14 Johns. (N. Y.), 134; *Anglo-American Provision Co. v. Davis Provision Co.*, 169 N. Y. 506, 62 N. E. 587, 88 Am. St. Rep. 608, affirmed 191 U. S. 373, 48 L. ed. 225, 24 S. Ct. 92 (statutory rule as to actions against foreign corporations); *Collard v. Beach*, 81 N. Y. App. Div. 582, 81 N. Y. Supp. 619.

But the courts of one state will not enforce penal obligations created in another state; nor will they enforce obligations which are contrary to domestic policy. See Beale, *Cases on Conflict of Laws*, vol. iii, pp. 402 *et seq.* On the question how far they will attempt to regulate the internal affairs of a foreign corporation, see Beale, *Foreign Corporations*, Chap. XIII. — *En.*

## LIVINGSTON v. JEFFERSON.

CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF  
VIRGINIA. 1811.[Reported 1 *Brockenbrough*, 203.]<sup>1</sup>

THIS was an action of trespass, brought in the circuit court of the United States, for the district of Virginia, by Edward Livingston, a citizen of the state of New York, against Thomas Jefferson, a citizen of the state of Virginia, and late President of the United States. . . .

The declaration contained eight counts. The first count charged, that the defendant, on the 25th day of January, 1808, at the city of New-Orleans, in the district of Orleans, *to wit, at Richmond, in the county of Henrico, and district of Virginia*, with force and arms, broke and entered a certain close of the plaintiff. The defendant pleaded to the jurisdiction of the court that the said close was situated in the territory of Orleans and outside the district of Virginia. The plaintiff replied that the defendant was not a resident of the territory of Orleans and was not amenable to the jurisdiction of the courts of that territory. To this replication the defendant demurred generally, and the plaintiff joined in demurrer.<sup>2</sup>

MARSHALL, C. J. — The sole question in this case is: — Can this Court take cognizance of a trespass committed on lands lying within the United States and without the Commonwealth of Virginia, in a case where the trespasser is a resident of, and is found within, the district? I concur with my brother judge in the opinion, that it cannot.

I regret, that the inconvenience to which delay might expose at least one of the parties, together with the situation of the Court, will not admit of my bestowing on this question, that deliberate consideration which the very able discussion it has received at the bar would seem to require; but I have purposely avoided any investigation of the subject previous to the argument, and must now content myself with a brief statement of the opinion I have formed, and a sketch of the course of reasoning which has led to it.

This doctrine of actions, local and transitory, has been traced up to its origin in the common law, and, as has been truly stated on

<sup>1</sup> Reported also Fed. Cas. No. 8411. — ED.

<sup>2</sup> The statement of facts is abridged. — ED.



both sides, it appears, that, originally, all actions were local; that is, that according to the principles of the common law, every fact must be tried by a jury of the vicinage. The plain consequence of this principle was, that those courts only could take jurisdiction of a case who were capable of directing such a jury as must try the material facts on which their judgment would depend. The jurisdiction of the courts, therefore, necessarily became local with respect to every species of action.

But the superior courts of England having power to direct a jury to every part of the kingdom, their jurisdiction could be restrained by this principle, only to cases arising on transactions which occurred within the realm. Being able to direct a jury either to Surrey or Middlesex, the necessity of averring in the declaration, that the cause of action arose either in Surrey or Middlesex, could not be produced in order to give the court jurisdiction, but to furnish a venue. For the purpose of jurisdiction, it would, unquestionably, be sufficient to aver, that the transaction, out of which the cause of action arose, occurred within the realm.

This, however, being, not a statutory regulation, but a principle of unwritten law, which is really human reason applied by courts, not capriciously, but in a regular train of decisions, to human affairs, for the promotion of the ends of justice; according to the circumstances of the nation, the necessity of the times, and the general state of things, was thought susceptible of modification; and judges have modified it. They have not changed the old principle as to form. It is still necessary to give a venue, and where the contract exhibits on its face evidence of the place where it was made, the party is allowed to aver that such place is in any county in England.

This is known to be a fiction. Like an ejectment, it is the creature of the courts, and is moulded to the purposes of justice, according to the views which its inventors have taken of its capacity to effect those purposes. It is not, however of undefinable extent. It has not absolutely prostrated all distinctions of place, but has certain limits prescribed to it, founded in reasoning, satisfactory to those who have gradually fixed those limits. It may well be doubted whether, at this day, they might be changed by a judge not perfectly satisfied with their extent.

This fiction is so far protected by its inventors, that the averment is not traversable for the purpose of defeating an action it was invented to sustain, but it is traversable whenever such traverse may be essential to the merits of the cause. It is always

traversable for the purpose of contesting a jurisdiction not intended to be protected by the fiction.

In the case at bar, it is traversed for that purpose; and the question is, whether this is a case in which such traverse is sustainable? or, in other words, whether the courts have so far extended their fiction, as, by its aid, to take cognizance of actions of trespass on lands not lying within those limits which bound their process?

They have, without legislative aid, applied this fiction to all personal torts, wherever the wrong may have been committed, and to all contracts, wherever executed. To this general rule, contracts respecting lands form no exception. It is admitted, that on a contract respecting lands, an action is sustainable wherever the defendant may be found. Yet in such a case, every difficulty may occur that presents itself in an action of trespass. An investigation of title may become necessary, a question of boundary may arise, and a survey may be essential to the full merits of the cause. Yet these difficulties have not prevailed against the jurisdiction of the court. They are countervailed, and more than countervailed, by the opposing consideration, that if the action be disallowed, the injured party may have a clear right without a remedy, in a case where a person who has done the wrong, and who ought to make the compensation, is within the power of the court.

That this consideration should lose its influence where the action pursues a thing not in the reach of the court, is of inevitable necessity; but for the loss of its influence where the remedy is against the person, and is within the power of the court, I have not yet discerned a reason, other than a technical one, which can satisfy my judgment.

If, however, this technical reason is firmly established, if all other judges respect it, I cannot venture to disregard it.

The distinction taken is, that actions are deemed transitory, where the transactions on which they are founded, might have taken place any where; but are local, where their cause is in its nature, necessarily local.

If this distinction is established; if judges have determined to carry their innovation on the old rule no further; if, under circumstances which have not changed, they have determined this to be the limit of their fiction, for a long course of time, it would require a hardihood, which, sitting in this place, I cannot venture on, to pass this limit.

This distinction has been repeatedly taken in the books, and is recognized by the best elementary writers, especially by Judge



Blackstone, from whose authority no man will lightly dissent. He expressly classes an action of trespass on lands, with those actions which demand their possession, and which are local; and makes those actions, only, transitory, that are brought on occurrences, which might happen any where. From the cases that support this distinction, no exception, I believe, is to be found among those that have been decided in Court on solemn argument.

One of the greatest judges who ever sat upon any bench, and who has done more than any other, to remove those technical impediments which grew out of a different state of society, and too long continued to obstruct the course of substantial justice, was so struck with the weakness of the distinction between taking jurisdiction in cases of contracts respecting lands, and of torts committed on the same lands, that he attempted to abolish it. In the case of *Mostyn v. Fabrigas*, 1 Cowper, 161, Lord Mansfield stated the true distinction to be, between proceedings which are *in rem*, in which the effect of the judgment cannot be had, unless the thing lay within the reach of the court, and proceedings against the person, where damages only are demanded. But this opinion was given in an action for a personal wrong, which is admitted to be transitory. It has not, therefore, the authority to which it would be entitled, had this distinction been laid down in an action deemed local, and may be termed an *obiter dictum*. He recites, in that opinion, two cases decided by himself, in which an action was sustained for trespass on lands lying in the foreign dominions of his Britannic Majesty. But both those decisions were at *nisi prius*, and though the overbearing influence of Lord Mansfield might have sustained them on a motion for a new trial, that motion never was made, and the principle did not obtain the sanction of the court. In a subsequent case reported in 4th Durnford and East, p. 503, [*Doulson v. Matthews*] (1792), these decisions are expressly referred to and overruled, and the old distinction is affirmed.

It has been said that the decisions of British courts made since the Revolution, are not authority in this country. I admit it. But they are entitled to that respect which is due to the opinions of wise men, who have maturely studied the subject they decide. Had the regular course of decisions, previous to the Revolution, been against the distinction now asserted, and had the old rule been overthrown by adjudications made subsequent to that event, this Court might have felt itself bound to disregard them; but where the distinction is of ancient date, has been long preserved, and a modern attempt to overrule it has itself been over-

ruled since the Revolution, I can consider the last adjudication in no other light than as the true declaration of the ancient rule.

According to the common law of England, then, the distinction taken by the defendants, between actions local and transitory, is the true distinction, and the action of trespass, *quare clausum fregit*, is a local action.

This common law has been adopted by the legislature of Virginia. Had it not been adopted, I should have thought it in force. When our ancestors migrated to America, they brought with them the common law of their native country, so far as it was applicable to their new situation, and I do not conceive that the Revolution, would, in any degree, have changed the relations of man to man, or the law which regulated those relations. In breaking off our political connexion with the parent state, we did not break off our connexion with each other. It remained subject to the ancient rules, until those rules should be altered by the competent authority.

But it has been said, that this rule of the common law is, impliedly, changed by the act of assembly, which directs that a jury shall be summoned from the by-standers.

Were I to discuss the effects of this act in the courts of the state, the inquiry, whether the fiction already noticed, was not equivalent to it in giving jurisdiction, would present itself. There are, also, other regulations, as that the jurors should be citizens, which would deserve to be taken into view. But I postpone these considerations, because I am decidedly of opinion, that the jurisdiction of the courts of the United States depends, exclusively, on the Constitution and laws of the United States.

In considering the jurisdiction of the circuit courts, as defined in the judicial act, and in the Constitution, which that act carries into execution, it is worthy of observation, that the jurisdiction of the court depends on the character of the parties, and that only the court of that district in which the defendant resides, or is found, can take jurisdiction of the cause. In a court so constituted, the argument drawn from the total failure of justice, should a trespasser be declared to be only amenable to the court of that district in which the land lies, and in which he will never be found, appeared to me to be entitled to peculiar weight. But according to the course of the common law, the process of the court must be executed, in order to give it the right to try the cause, and, consequently, the same defect of justice might occur. Other judges have felt the weight of this argument, and have struggled ineffec-

tually against the distinction which produces the inconvenience of a clear right without a remedy. I must submit to it.

The law, upon the demurrer, is in favour of the defendant.<sup>1</sup>

<sup>1</sup> In the following cases in which the cause of action arose outside the jurisdiction where the suit was brought, the plaintiff was precluded from recovering, on the ground that the action was local. *British South Africa Co. v. Companhia de Moçambique*, (1893) A. C. 602 (trespass to land); *Clark v. Seudder*, 6 Gray (Mass.), 122 (action on a covenant running with the land brought by an assignee of the covenantee); *Reams v. Sinclair*, 88 Neb. 738, 130 N. W. 562 (partition proceedings); *White v. Sanborn*, 6 N. H. 220 (action on a covenant running with the land brought by an assignee of the covenantee); *Karr v. New York Jewell Filtration Co.*, 78 N. J. L. 198, 73 Atl. 132 (excavation causing subsidence of adjoining land); *Am. U. T. Co. v. Middleton*, 80 N. Y. 408 (cutting timber when one inseparable trespass); *Brisbane v. P. R. R. Co.*, 205 N. Y. 431, 98 N. E. 752, 44 L. R. A. (n.s.), 274 (negligently setting fire resulting in destruction of trees).

In the following cases, on the other hand, the plaintiff recovered, because the action was held to be transitory. *Hodges v. Hunter Co.*, 61 Fla. 280, 54 So. 811, 34 L. R. A. (n.s.), 994 (conversion of timber); *Campbell v. W. M. Ritter Lumber Co.*, 140 Ky. 312, 131 S. W. 20, 140 Am. St. Rep. 385 (action brought by lessor against lessee for waste); *Little v. Chicago, etc., Ry. Co.*, 65 Minn. 48, 67 N. W. 846, 60 Am. St. Rep. 421, 33 L. R. A. 423 (negligently setting fire resulting in injury to land; rejecting the whole doctrine of *Livingston v. Jefferson*; see *Peyton v. Desmond*, 129 Fed. 1, 63 C. C. A. 651); *Phelps v. Decker*, 10 Mass. 267 (action brought by covenantee on covenant in a deed conveying land); *Corporation of N. Y. v. Dawson*, 2 Johns. Cas. (N. Y.), 335 (use and occupation); *Jackson v. Hanna*, 53 N. C. 188 (action brought by covenantee on covenant in a deed conveying land); *Brady v. Brady*, 161 N. C. 324, 77 S. E. 235, 44 L. R. A. (n.s.), 279 (proceeds of the sale of timber wrongfully cut); *Henwood v. Cheeseman*, 3 Serg. & R. (Pa.), 500 (use and occupation); *Sheppard v. Coeur D'Alene Lumber Co.*, 62 Wash. 12, 112 Pac. 932, 44 L. R. A. (n.s.), 267 (use and occupation).

It has been held that a statute making local actions transitory does not apply to actions arising outside the jurisdiction. *British South African Co. v. Companhia de Moçambique*, *supra*; *Allin v. Conn. R. L. Co.*, 150 Mass. 560, 23 N. E. 581 (action for trespass to land commenced by trustee process). Compare *Cragin v. Lovell*, 88 N. Y. 258 (action for waste). The opposite result was reached, however, in *Coleman v. Luksinger*, 224 Mo. 1, 123 S. W. 441, 26 L. R. A. (n.s.), 934 (action on covenant running with the land brought by assignee of covenantee); *Tillotson v. Prichard*, 60 Vt. 94, 14 Atl. 302, 6 Am. St. Rep. 95 (like preceding case).

Where an act is done in one state which results in injury to land in another state an action lies in the former as well as in the latter state. *Smith v. Southern Ry. Co.*, 136 Ky. 162, 123 S. W. 678, 26 L. R. A. (n.s.), 927; *Mannville Co. v. Worcester*, 138 Mass. 89, 52 Am. Rep. 261.

On the question of waiver of the objection that the action is local and arose outside the jurisdiction, see *Sentenis v. Ladew*, 140 N. Y. 463, 35 N. E. 650. — Ed.

ATKINS v. BORSTLER *et al.*

SUPREME COURT OF MICHIGAN. 1881.

[Reported 46 *Michigan*, 552.]

CAMPBELL, J.<sup>1</sup> Plaintiff who resides in Mecosta county, sued defendants, who reside in another State, on contract, the suit being brought in Kent county and service made there. Defendants pleaded in abatement showing their non-residence and that of plaintiff, and claiming that under our statutes they could only be sued in Mecosta. On demurrer this plea was sustained, and plaintiff brings error.

It was held in *Haywood v. Johnson*, 41 Mich. 598, that a resident of the State could not be sued in a transitory action in a county where neither party resided. It was held in *Turrill v. Walker*, 4 Mich. 177, that the circuit courts could get no jurisdiction unless one defendant is served in the county. It results from these decisions that a suit in Mecosta would have been fruitless unless a defendant should be found there, and that unless a suit can be brought where a non-resident defendant is found, he cannot be sued at all, in many cases, and could not have been in this case.

Reliance is had by defendants on section 5970 of the Compiled Laws of 1871, which requires transitory actions to be tried in the county "where one of the parties shall reside at the time of commencing such action." This was held in *Haywood v. Johnson*, to require suits to be commenced in such county. And if the section applies to non-residents of the State, the decision below was correct. But if correct it follows that there are many transitory actions on contract, as well as in tort, where such persons can always evade the justice of this State by keeping away from counties where their creditors reside. The Constitution gives jurisdiction without any exception, in such cases, to the circuit courts. It would not be competent for the Legislature to take it away. And if the statute in question would have any such effect according to its ordinary meaning we are compelled to choose between holding it to that extent void, or construing it according to what was no doubt its real intent, as not applicable here.

We have no doubt the section in question was intended to be a beneficial section in the direction of saving defendants from vexatious suits in places remote from their homes. It accordingly

<sup>1</sup> The statement of facts is omitted. — Ed.



saved them the privilege of being sued at home, or in the home county of the plaintiff, who was regarded as entitled also to some consideration. It is evident that in so legislating the law-makers had no idea of granting a privilege to non-residents against being sued at all. The natural inference is that those who were entitled to be sued in the forum of their residence, are persons whose residence contains one of the courts of the State; so that suits may be brought under our laws. The language of the statute only applies to trials of actions brought under our laws; and if any case arises under our laws it would be absurd to hold that the Legislature meant to say it should not be tried at all. Those who claim the privilege must point out a Michigan forum where they can be found for service of process. The statute applies to no others.

This has been the uniform practical construction, and this is the first case brought to our notice, in which any non-resident defendant has claimed exemption from process. This practical construction of nearly forty years cannot be disregarded. We think that the case is not within the statute, and that service on the defendants in any county of this State is valid when suit was commenced in that county.

Judgment must be reversed with costs of both courts and the demurrer sustained, with leave to defendants to answer over and plead issuably in twenty days.

The other Justices concurred.<sup>1</sup>

<sup>1</sup> In the case of actions arising within the state the common law distinction between local and transitory actions was early rejected in some jurisdictions as a result of construction of statutory or constitutional provisions. *Genin v. Grier*, 10 Oh. 209.

The law as to the venue or place of trial when the cause of action has arisen within the state is now largely regulated by express statutory provisions in the several states. These statutes fix the venue in some cases at the *situs* of the subject of the action, in others at the place where the cause of action arose, in others at the residence of a party.

In cases where the venue depends upon the residence of the parties, the statutes generally make express provision for cases where, as in the principal case, the defendant is a non-resident. See the statutes of the several states and 40 Cyc. 102.

The New York Code of Procedure, 1849, contained the following provisions as to the place of trial of civil actions:—

"Sec. 123. Actions for the following causes, must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial, in the cases provided by statute.

"1. For the recovery of real property or of an estate or interest therein, or

BIRMINGHAM IRON FOUNDRY *v.* HATFIELD.

COURT OF APPEALS OF NEW YORK. 1870.

[Reported 43 *New York*, 224.]

APPEAL from the judgment of the General Term of the Supreme Court in the second judicial district, affirming the judgment of the Special Term.

This is an action brought for the foreclosure of a mortgage made and delivered to the plaintiff by the defendants, John W. Hatfield and wife.

The venue was laid in Queens county, and the case was on the calendar in that county in October, 1867. The court, for its own

for the determination, in any form, of such right or interest, and for injuries to real property:

"2. For the partition of real property:

"3. For the foreclosure of a mortgage of real property:

"4. For the recovery of personal property, distrained for any cause.

"Sec. 124. Actions for the following causes, must be tried in the county where the cause or some part thereof arose, subject to the like power of the court, to change the place of trial in the cases provided by statute:

"1. For the recovery of a penalty or forfeiture imposed by statute; except, that when it is imposed for an offence committed on a lake, river, or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river or stream, and opposite to the place where the offence was committed:

"2. Against a public officer or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person, who by his command or in his aid, shall do anything touching the duties of such officer.

"Sec. 125. In all other cases, the action shall be tried in the county in which the parties or any of them shall reside at the commencement of the action; or if none of the parties shall reside in the state, the same may be tried in any county which the plaintiff shall designate in his complaint; subject, however, to the power of the court to change the place of trial, in the cases provided by statute.

"Sec. 126. If the county designated for that purpose in the complaint, be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant shall, before the time for answering expire, demand in writing that the trial be had in the proper county."

For the present law in New York, see New York Code of Civil Procedure, secs. 982-991.

In England it is provided by the Rules of the Supreme Court, 1883, Order XXXVI, Rule 1, that "There shall be no local venue for the trial of any action, except where otherwise provided by statute, but in every action in every Division the place of trial shall be fixed by the Court or a judge." See *Annual Practice*, 1914, p. 581; *Odgers, Pleading & Practice*, 6th ed., 67, 68. — Ed.



convenience, adjourned the cause to a Special Term of the Supreme Court, to be held at Brooklyn, in the county of Kings. The defendants objected to the adjournment to the county of Kings, but their objection was overruled. The cause was tried at the Kings county Special Term, and an order for final judgment was made in said county of Kings, though the judgment was entered and the costs adjusted in Queens county.

From the judgment so entered, an appeal was taken to the General Term, where the judgment was affirmed, and from such judgment of affirmance an appeal was taken to this court.

ANDREWS, J.<sup>1</sup> The legislature, having in view some general policy for the distribution of the judicial business of the State, as well as the convenience of parties, has prescribed the place where the trial and other proceedings in actions in the Supreme Court shall be had.

The place of trial of actions is provided for in title four of part second of the Code, and it declared in section 123 that actions for certain specified causes must be tried in the county where the cause of action, or some part thereof, arose, subject to the power of the court to change the place of trial in cases where (1) the county designated for that purpose in the complaint is not the proper county, or (2) when there is reason to believe that an impartial trial cannot be had therein, or (3) when the convenience of witnesses, and the ends of justice would be promoted by the change.

The action for the foreclosure of a mortgage upon real property is among the causes specified in this section. . . .

This action was triable in the county of Queens.

The mortgaged premises, which were the subject of the action, are situate in that county. That was the place named in the complaint as the place of trial. The cause was at issue and noticed for trial at a Special Term in that county, and the court had not changed the place of trial under the 126th section of the Code.

The justice who held the Special Term, when the cause was reached, on his own motion, and, as stated in the case, for his own convenience, against the objection of the defendants, adjourned the hearing to a Special Term thereafter to be held in the county of Kings, and the cause was tried in that county under this order of the court.

The ground upon which the court proceeded in changing the place of trial is not one of those mentioned in the section we have

<sup>1</sup> A part of the opinion is omitted. — Ed.

cited, and unless the authority is found elsewhere, the action of the court was irregular and unauthorized. . . .

The defendants by appearing upon the trial of the action did not waive their objection to the adjournment of the trial to Kings county.

The court could not, without the consent of the parties, try the action in that county. If no objection had been made by the defendants, their presence at the trial might have been evidence of such consent; but, having made the objection, they were not obliged to renew it. Nor were they compelled to abandon their defense on the trial in order to preserve the rights secured to them by statute.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All the judges concurring, judgment reversed and new trial ordered.<sup>1</sup>

<sup>1</sup> As to the power to grant a change of venue, see *Cochecho R. R. v. Farrington*, 26 N. H. 428; *Tidd, Practice*, 8th ed., 650-653; 40 Cyc. 116; 4 *Encyc. of Pl. & Pr.* 373. — ED.

## CHAPTER II.

### PROCESS.

#### SECTION I.

##### *Form of Process.*

*(Form of Writ of Summons in England.)*<sup>1</sup>

In the High Court of Justice.

.....Division.

Between A.B.,

Plaintiff,

and

C.D.,

Defendant.

GEORGE THE FIFTH, by the grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith.

To C. D. of.....in the county of.....

We command you, That within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of A.B.; and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence.

Witness, Richard Burdon, Viscount Haldane of Cloan,

Lord High Chancellor of Great Britain, the.....day of  
.....in the year of Our Lord One thousand nine hundred and

.....  
[*Memorandum to be subscribed on the writ :*]

N.B. — This writ is to be served within twelve calendar months from the date thereof, or, if renewed, within six calendar months from the date of the last renewal, including the day of such date, and not afterwards.

The defendant may appear hereto by entering an appearance either personally or by solicitor at the Central Office, Royal Courts of Justice, London.

<sup>1</sup> This is the general form of a Writ of Summons in the High Court of Justice, as provided for by the Rules of the Supreme Court, 1883. The form of a writ for issue from a District Registry, or of a writ for service out of the

[Indorsements to be made on the writ before issue thereof:]

The plaintiff's claim is for damages for breach of contract to accept and pay for goods.

This writ was issued by the said plaintiff,<sup>1</sup> who resides at.....

[Indorsement to be made on the writ after service thereof:]

This writ was served by me at.....on the defendant.....  
on.....the.....day of....., 19.....

Indorsed the.....day of....., 19.....

(Signed)

(Address)

(Form of Writ of Summons in Illinois.)

State of Illinois, }  
County of Cook, } ss.

The People of the State of Illinois, to the Sheriff of said County,

GREETING:

We command you that you summon C. D. if he shall be found in your County, personally to be and appear before the Circuit Court of Cook County, on the first day of the term thereof, to be holden at the Court House in the City of Chicago in said Cook County, on the third Monday of.....A.D., 19....., to answer unto A. B. in a plea of *trespass on the case upon promises*, to the damage of said plaintiff, as it is said, in the sum of.....dollars.

And have you then and there this writ with an endorsement thereon, in what manner you shall have executed the same.

WITNESS, M. N., Clerk of our said Court, and the seal thereof, at Chicago, in said County, this.....day of.....A.D. 19.....

M. N., Clerk.

SEAL OF THE CIR-  
CUIT COURT OF  
COOK COUNTY.

[Return of sheriff, endorsed on summons:]

Served this writ on the within named defendant, C. D., by reading the same to him, and at the same time delivering a copy thereof to him this.....day of....., 19.....

S. T., Sheriff.

Fees:.....

By V. W., Deputy.

jurisdiction, or of a specially indorsed writ, is slightly different. See Rules of the Supreme Court, 1883, Appendix A., Part I.

<sup>1</sup> Or, This writ was issued by E. F., of....., whose address for service is....., solicitor for the said plaintiff, who resides at.....; or, This writ was issued by G. H., of....., whose address for service is.....agent for.....of....., solicitor for the said plaintiff, who resides at.....

(*Form of Writ of Summons and Attachment in Massachusetts.*)<sup>1</sup>

COMMONWEALTH OF MASSACHUSETTS.

Suffolk, ss.

*To the Sheriffs of our several Counties or their Deputies,*

SEAL OF THE  
SUPERIOR COURT.

GREETING.

We command you to attach the goods or estate of C. D., of Boston, in said County, defendant, to the value of .....dollars, and to summon the said defendant (if he may be found in your precinct) to appear before our Justices of our Superior Court to be holden at Boston, within and for our said County of Suffolk, on the first Monday of .....next; then and there in our said Court to answer unto A. B., of Boston, in said County, plaintiff, in an action of *contract*, to the damage of the said plaintiff (as he says) the sum of .....dollars, which shall then and there be made to appear with other due damages. And have you there this writ with your doings therein.

Witness, ....., Esquire,<sup>2</sup> at Boston, the .....day of ....., in the year of our Lord one thousand nine hundred and .....

M. N., Clerk.

[*Officer's return, endorsed on the writ :*]

Suffolk, ss.

Boston, .....19.....

By virtue of this writ, I this day attached a chip as the property of the within named defendant, C. D., and afterwards on the same day, I summoned said defendant to appear and answer at Court as within directed, by delivering to him in hand a summons together with an attested copy of this writ. Said service was made at.....

Fees:.....

V. W., Deputy Sheriff.

<sup>1</sup> The form here given is that of a summons and attachment, which is the writ ordinarily used in actions which are not begun by the trustee process. When no actual attachment is desired by the plaintiff, the officer makes a return like that in the form here given. It is possible, but very unusual in practice, to begin an action by an original summons, similar in form to the summons and attachment, except that the direction to attach the goods and estate of the defendant is omitted. See Mass. R. L., c. 167, secs. 15-17. For a form of original summons, see Mass. G. L., p. 162. — Ed.

<sup>2</sup> The Constitution of Mass., Part II, c. VI, art. 5, provides that all writs issuing out of the clerk's office in any of the courts of law "shall bear test of



(Form of Summons in New York.)<sup>1</sup>

Supreme Court of the State of New York  
County of New York

|                 |   |          |
|-----------------|---|----------|
| A.B., Plaintiff | } | Summons. |
| against         |   |          |
| C.D., Defendant |   |          |

To the above named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated.....

X. Y., *Attorney for Plaintiff.*  
Office and Post-Office address,  
No. 1000 Wall Street,  
Borough of Manhattan,  
The City of New York.

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## SECTION II.

### *Service of Process.*

#### A. AS A BASIS OF PERSONAL JUDGMENT.

#### NEEDHAM v. THAYER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1888.

[Reported 147 *Massachusetts*, 536.]

CONTRACT on a judgment recovered by the plaintiff, on March 7, 1874, in the Superior Court. Writ dated May 16, 1887. The answer alleged, that the plaintiff ought not to maintain the action against the defendant "upon said judgment, because he had no notice of said suit in which said judgment was obtained; that at the time of the service of said writ in said last-named action the

the first justice of the court to which they shall be returnable, who is not a party." — ED.

<sup>1</sup> The form of summons here given is provided for by the New York Code of Civil Procedure, sec. 418, wherein it is also provided that "the summons is deemed the mandate of the court." — ED.

defendant was an inhabitant and resident of the State of Connecticut, and had no notice of the commencement of said action, or of its pendency in court."

At the trial in the Superior Court, without a jury, before Dunbar, J., after evidence that the judgment remained unsatisfied, the defendant offered evidence tending to show that at the time the original action, resulting in the recovery of the judgment, was commenced, he was not a resident of this Commonwealth, but was a resident of the State of Connecticut; that no service of the writ in that action was made as required by law, and no notice was given to him of such action; that such action was brought without his knowledge, and that he had no notice of the same until after the commencement of this action; and that the judgment in the original action was obtained against him by default. The judge, upon objection by the plaintiff, excluded the evidence, and found for the plaintiff; and the defendant alleged exceptions.

MORRIS, C. J. The question of the validity of a judgment rendered by a court of this State against a defendant who was not a resident of the State, and who was not served personally with process within the State, was considered in *Eliot v. McCormick*, 144 Mass. 10. In that case this court, following the decisions in the Supreme Court of the United States, held that such judgment contravened the fourteenth article of the Amendments of the Constitution of the United States, and was invalid, and would be reversed upon a writ of error.

The case at bar presents the question, whether, in a suit in this State upon such a judgment, the defendant may show by plea and proof that it is invalid. The recent cases in the Supreme Court of the United States go upon the ground, that a judgment *in personam* against a person who is not a resident of the State, who has not been personally served with process, and who has not appeared, is wholly void, and that no suit can be maintained on it, either in the same or in any other court. *Pennoy v. Neff*, 95 U. S. 714, 732. *Freeman v. Alderson*, 119 U. S. 185. The court has no jurisdiction, and its judgment has no force, either in the State in which it was rendered, or in any other State. This being so, the judgment cannot be enforced by a suit upon it, and the non-resident defendant cannot be deprived of his right to show by plea and proof, if such suit is brought, that the judgment is void, without an abridgment of his privileges and immunities, to protect which was the object of the fourteenth article of Amendment. To compel him to resort to our courts by a writ of error, in which he must file a bond if he

would obtain a stay of the execution, is to impose a burden upon him, and thus to abridge his privileges and immunities. It has been held, in many cases, that a domestic judgment cannot be impeached by plea and proof in a suit brought upon it, because the proper remedy is a writ of error. *Hendrick v. Whittemore*, 105 Mass. 23, and cases cited. But while a State may make laws binding its own citizens, requiring them to resort to a writ of error, it cannot so bind citizens of other States.

The case of *McCormick v. Fiske*, 138 Mass. 379, seems opposed to our views. But in that case the question of the effect of the fourteenth article of Amendment was not raised or suggested to the court, and therefore was not considered. In the case at bar, the effect of that amendment is involved. The defendant's answer sets up that, at the time when the original suit was brought against him, he was a non-resident, and that no service was made upon him. We are of the opinion that he had the right to impeach the judgment by proof of these facts, and that the ruling rejecting such evidence was erroneous.

*Exceptions sustained.*<sup>1</sup>

<sup>1</sup> A personal judgment against a non-resident defendant served by publication only is held invalid even in the state where it is rendered. *Coeke v. Brewer*, 68 Miss. 775, 9 So. 823; *Smith v. McCutchen*, 38 Mo. 415; *McKinney v. Collins*, 88 N.Y. 216; *Paxton v. Daniell*, 1 Wash. 19, 23 Pac. 441.

A personal judgment against a non-resident defendant personally served outside the state where the judgment is rendered is likewise held invalid even in that state. *Harkness v. Hyde*, 98 U. S. 476, 25 L. ed. 237; *Denny v. Ashley*, 12 Col. 165, 20 Pac. 331; *Long v. Insurance Co.*, 114 N. C. 465, 19 S. E. 347; *Wallace v. United Electric Co.*, 211 Pa. 473, 60 Atl. 1046; *Scott v. Streepy*, 73 Tex. 547, 11 S. W. 532.

No action will lie in another state on a personal judgment against a defendant not personally served within the state where the judgment is rendered nor resident therein. *Buchanan v. Rucker*, 9 East, 191; *Schibsby v. Westenholz*, L. R. 6 Q. B. 155; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Rand v. Hanson*, 154 Mass. 87, 28 N. E. 6; *McEwan v. Zimmer*, 38 Mich. 765; *Whittier v. Wendell*, 7 N. H. 257 (*semble*); *Price v. Schaeffer*, 161 Pa. 530, 29 Atl. 279, 25 L. R. A. 699. And the mere fact that the cause of action arose within the state where the judgment is rendered does not give its courts jurisdiction. *Sirdar Gurdial Singh v. Rajah of Faridkote*, (1894) A. C. 670; *Emanuel v. Symon*, (1908) 1 K. B. 302. — ED.

## SMITH v. GIBSON.

SUPREME COURT OF ALABAMA. 1887.

[Reported 83 *Alabama*, 284.]

CLOPTON, J. The action was brought by appellee in the Circuit Court of Walker county, to recover the amount due on a promissory note made by appellant. The defendant filed a plea to the jurisdiction of the court, on the ground that, at the commencement of the suit, and of the service of process, he was a resident citizen of Maryland. The assignments of error only relate to the ruling of the court, sustaining a demurrer to the plea. The summons was served on the defendant in person by the sheriff. The plea does not negative his presence in the county at the time of service; and fails to aver that he was induced by false representations, or by any artifice, to come within the jurisdiction of the court, for the purpose of obtaining service of process upon him.

The general rule is, that every country has jurisdiction over all persons found within its territorial limits, for the purposes of actions in their nature transitory. It is not a debatable question, that such actions may be maintained in any jurisdiction in which the defendant may be found, and is legally served with process. However transiently the defendant may have been in the State, the summons having been legally served upon him, the jurisdiction of his person was complete, in the absence of a fraudulent inducement to come. — *Peabody v. Hamilton*, 106 Mass. 217; 76 Amer. Dec., note, 667; Whar. Con. Laws. §§ 738, 739. The statute providing that suits against a resident free-holder or house-holder must be brought in the county of his residence, has no application.

*Affirmed.*<sup>1</sup>

<sup>1</sup> *Darrah v. Watson*, 36 Ia. 116; *Alley v. Caspari*, 80 Me. 234, 14 Atl. 12; *Thompson v. Cowell*, 148 Mass. 552, 20 N. E. 170, *accord*. So although the plaintiff is also a non-resident. *Lee v. Baird*, 139 Ala. 526, 36 So. 720; *Peabody v. Hamilton*, 106 Mass. 217. See page 2, note 1, *ante*.

## METHODS OF EFFECTING PERSONAL SERVICE

In the absence of any statutory provision as to the method of effecting personal service, it has been held that the summons must be read to the defendant. *Law v. Grommes*, 158 Ill. 492, 41 N. E. 1080. (For the present rule in Illinois see *Hurd's R. S.* 1913, ch. 110, sec. 2.)

The method of effecting personal service is regulated by statutes in the several states. The usual method is by delivery of a copy of the summons,



## MATTHEWS v. TUFTS.

COURT OF APPEALS OF NEW YORK. 1882.

[Reported 87 *New York*, 568.]

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made October 21, 1881, which reversed an order of Special Term, setting aside the service of the summons herein upon defendant Tufts, and dismissing the action as to him.

The motion was founded upon the affidavit of said defendant, which stated in substance that he was a resident of Boston, and came to the city of New York for the purpose of attending at the first meeting of creditors of Edward Matthews, a bankrupt, the husband of the plaintiff, held there before a register in bankruptcy; that defendant "attended said meeting solely as a creditor and witness, to prove certain debts and claims against the estate of said bankrupt, to participate in the choice of assignee, and for no other purpose." "While still attending in said office as such witness," and "about fifteen minutes after the meeting had adjourned," the summons in this action was served on the defendant.

The bankrupt made an opposing affidavit, in general terms, claiming that the defendant was, "in fact, no creditor of this deponent in said bankruptcy matter or otherwise, and was not at the date of said meeting." It was admitted that the defendant did prove eight claims at the meeting, amounting to \$386,568.53.

RAPALLO, J. In *Van Lieu v. Johnson*, decided March, 1871, and referred to in *Person v. Grier*, 66 N. Y. 124, a majority of this court were of opinion that a summons could not be served upon a defendant, a non-resident of the State, while attending a court in this State as a party. This immunity does not depend upon statutory provisions, but is deemed necessary for the due administra-

with or without an exhibition of the original; or by reading the summons or explaining its contents.

As to how far the defendant may prevent service by refusing to hear the summons read, or by refusing to receive a copy of it, or otherwise, see *Heath v. White*, 2 Dowl. & L. 40; *Boggs v. Inter-American, etc., Co.*, 105 Md. 371, 66 Atl. 259; *Slaght v. Robbins*, 13 N. J. L. 340; *Van Rensselaer v. Petrie*, 2 How. Pr. (N. Y.), 94; *Davison v. Baker*, 24 How. Pr. (N. Y.), 39; *Correll v. Granget*, 12 Misc. (N. Y.), 209, 34 N. Y. Supp. 25; *Borden v. Borden*, 63 Wis. 374, 23 N. W. 573. Compare *Krotter & Co. v. Norton*, 84 Neb. 137, 120 N. W. 923. — ED.



tion of justice. It is not confined to witnesses, but extends to parties as well, and is abundantly sustained by authority. *Cole v. Hawkins*, Andr. 275; s. c., 2 Str. 1094; *Arding v. Flower*, 8 T. R. 534; *Miles v. McCullough*, 1 Binn. 77; *Hayes v. Shields*, 2 Yeates, 222; *Parker v. Hotchkiss*, 1 Wall. Jr. 269; *Juneau Bank v. McSpedan*, 5 Biss. 64; *Halsey v. Stewart*, 1 South. [N. J.] 366; *Miller v. Dungan*, 8 Vr. [N. J.] 182; *In re Healey*, 53 Vt. 694. This exemption from service of civil process has been frequently accorded to creditors attending proceedings in bankruptcy (*Ex parte List*; 2 Ves. & B. 373; *Ex parte King*, 7 Ves. Jr. 312), and to a creditor who attended before the commissioners to propose himself as assignee and watch the proceedings. *Selby v. Hills*, 8 Bing. 166. Commissioners in bankruptcy are a court of justice sufficient for the purpose of having their witnesses protected by the Court of Chancery, at least, if not by themselves. They sit in the nature of a court in the administration of justice. *Arding v. Flower*, 8 T. R. 534. In proceedings in bankruptcy the due administration of justice requires that all the creditors should be free to attend, without interference by service of process of any kind. The moving affidavit showed that the defendant came from Boston where he resides, to New York, and attended the meeting of creditors at the office of the register in bankruptcy, solely as a creditor and witness, to prove certain debts and claims against the estate of the bankrupt, and to participate in the choice of an assignee, and for no other purpose; that while so attending, and while the meeting was being held, or immediately thereafter, before he had time to complete his business as such creditor and witness at such meeting and leave the office, the summons was served upon him. It appears that the defendant did at said meeting present proofs of claims amounting to upwards of \$386,000 in his own behalf, and also presented proof of claims of other creditors as their attorney in fact, and voted for the assignee both individually and as attorney for the other creditors whom he represented, and that the proofs of debt had been prepared and verified in Massachusetts. The plaintiff claims that the defendant was not attending as a witness, but only as a creditor, and also, on the hearing of the motion, read affidavits denying the validity of his claims as a creditor. These claims could not be tried on the motion to set aside the service, and, conceding that the defendant was in attendance only as a party, and as attorney of other parties, we think that he was privileged from service of process or summons while so attending.

The order of the General Term should be reversed and that of the Special Term affirmed, with costs.

All concur.

*Ordered accordingly.*<sup>1</sup>

<sup>1</sup> For conflicting decisions as to the privilege of non-resident parties from service of civil process, see *Hale v. Wharton*, 73 Fed. 739; *Bolz v. Crone*, 64 Kan. 570, 67 Pac. 1108; *Parker v. Mareo*, 136 N. Y. 585, 32 N. E. 989, 20 L. R. A. 45, 32 Am. St. Rep. 770; *Andrews v. Lembeck*, 46 Oh. St. 38, 18 N. E. 483, 15 Am. St. Rep. 547, which allow the privilege; *Bishop v. Vose*, 27 Conn. 1; *Baisley v. Baisley*, 113 Mo. 544, 21 S. W. 29, 35 Am. St. Rep. 726 (*semble*), which deny the privilege.

As to privilege of non-resident witnesses from service of civil process, see *Chittenden v. Carter*, 82 Conn. 585, 74 Atl. 884, 18 Ann. Cas. 125; *Greer v. Young*, 120 Ill. 184, 11 N. E. 167; *Mitchell v. Huron Circuit Judge*, 53 Mich. 541, 9 N. W. 176; *Mulhearn v. Press Publishing Co.*, 53 N. J. L. 153, 21 Atl. 186, 11 L. R. A. 101; *In re Healey*, 53 Vt. 694.

As to privilege of parties and witnesses from service of civil process while actually in court, see *Cameron v. Roberts*, 87 Wis. 291, 58 N. W. 376.

As to privilege of non-resident defendants in criminal suits from service of civil process, see *Dwelle v. Allen*, 193 Fed. 546; *Murray v. Wilcox*, 122 Ia. 188, 97 N. W. 1087, 64 L. R. A. 534, 101 Am. St. Rep. 263; *Netograph Mfg. Co. v. Serugham*, 197 N. Y. 377, 90 N. E. 962, 27 L. R. A. (n.s.), 333, 134 Am. St. Rep. 886.

On the question whether non-resident attorneys are privileged from service of civil process, see *Robbins v. Lincoln*, 27 Fed. 342; *Read v. Neff*, 207 Fed. 890; *Hoffman v. Bay Circuit Judge*, 113 Mich. 109, 71 N. W. 480, 38 L. R. A. 663, 67 Am. St. Rep. 458; *Greenleaf v. Bank*, 133 N. C. 292, 45 S. E. 638, 63 L. R. A. 499, 98 Am. St. Rep. 709; *Whitman v. Sheets*, 20 Oh. Cir. Ct. 1. Compare *National Press Intelligence Co. v. Brooke*, 18 Misc. (N. Y.), 373, 41 N. Y. Supp. 658.

On the question of privilege of a non-resident party to an action from service of process in an action for a wrong in connection with the original action or for a cause of action arising after he has come into the state, see *Nichols v. Horton*, 14 Fed. 327; *Iron Dyke Copper Min. Co. v. Iron Dyke R. Co.*, 132 Fed. 208; *Mullen v. Sanborn*, 79 Md. 364, 29 Atl. 522, 25 L. R. A. 721, 47 Am. St. Rep. 421.

As to privilege from arrest of parties, witnesses, and attorneys, see *Thompson's Case*, 122 Mass. 428; *Ellis v. Degarmo*, 17 R. I. 715, 24 Atl. 579; *Tidd's Practice*, 8th ed., 198-200; 3 Blackstone, Com. \*289.

As to waiver by failure to object to a violation of privilege, see *Morrow v. U. H. Dudley & Co.*, 144 Fed. 441, where on the facts it was held that the privilege was not waived.

As to privilege of legislators, see *Howard v. Trust Co.*, 12 App. D. C. 222; *Berlet v. Weary*, 67 Neb. 75, 93 N. W. 238, 60 L. R. A. 609, 108 Am. St. Rep. 616; *Bartlett v. Blair*, 68 N. H. 232, 38 Atl. 1004; *Worth v. Norton*, 56 S. C. 56, 33 S. E. 792, 76 Am. St. Rep. 524.

As to the effect of fraud in inducing the defendant to come into the state and there serving him with process, see *Jaster v. Currie*, 198 U. S. 144, 49 L. ed. 988, 25 S. Ct. 614 (where it was held, reversing s.c., 69 Neb. 4, 94 N. W. 995, that the facts did not amount to fraud); *Frawley, Bundy & Wilcox v. Penn.*

CABANNE *v.* GRAF.

SUPREME COURT OF MINNESOTA. 1902.

[Reported 87 *Minnesota*, 510.]

START, C. J.<sup>1</sup> Action in the municipal court of the city of St. Paul to recover damages for a breach by the defendant of a contract whereby he agreed to employ the plaintiff for a stated period. Judgment was entered by default against the defendant for the sum of \$496.92 costs and damages.

The proof of the service of the summons was to the effect that it was served by the plaintiff's attorney upon the defendant by handing to and leaving with his agent and representative (naming him) a true copy thereof, and that the defendant had been engaged in business in the city of St. Paul for six months then last past, and was absent from this state. The defendant appeared specially, and moved the court to set aside the judgment as void. The plaintiff then made a motion to amend his proof of service of the summons so as to show that the defendant was a nonresident of the state of Minnesota, and not therein, but had been for more than a year then last past actively engaged in carrying on business at the city of St. Paul, which was in charge of his agent and representative, upon whom service was made. The trial court allowed the proof of service to be so amended, and denied the defendant's motion to set aside the judgment as void. The defendant appealed from the order denying his motion.

It evidently was the intention of the plaintiff to make service of the summons in this case pursuant to the provisions of Laws 1901, c. 278, which are to the effect that, whenever a cause of action exists in favor of a resident of this state against any nonresident individual, association, or copartnership engaged in business in this state, by reason of such business, the summons may be served upon the manager, superintendent, foreman, agent, or representative of such individual, association, or copartnership while in charge of

Casualty Co., 124 Fed. 259 (where an agent of the defendant corporation was inveigled into the state); *Dunlap & Co. v. Cody*, 31 Ia. 260; *Steiger v. Bonn*, 59 How. Pr. (N.Y.), 496, 4 Fed. 17; *Taylor, Petitioner*, 29 R. I. 129, 69 Atl. 553 (where it was held that the service was good because the plaintiff was not privy to the fraud).

See on the general question of privilege, *Alderson, Judicial Writs and Process*, Chap. XXV; 32 Cyc. 490; 16 Encyc. of Pl. and Pr. 968; 19 *id.* 606. — Ed.

<sup>1</sup> The statement of facts is omitted. — Ed.

such business, with the same effect as if it were personally served. Section 2 of the act provides that the summons in such cases, in the absence from this state of the defendant, of which the sheriff's return shall be *prima facie* evidence, may be made by delivering a copy to the agent or representative of such nonresident defendant while he is in actual charge of the business out of which the cause of action arose.

Waiving the objections of the defendant that the record does not show a compliance with the terms of the statute, we have for our decision the question whether the statute, in so far as it authorizes the service of summons on a nonresident and absent defendant with the same effect as if personally served on him within the state, is constitutional. Whether the statute is valid as applied to associations or copartnerships, which are *quasi* legal entities, to the extent of binding their property, but not that of the individuals of which they are composed, we do not consider or decide, for this is not such a case, but one against an individual. It is a case where the defendant was a nonresident and absent natural person, having property within this state, which the court did not seize, and upon whom the summons was never served, except by delivering a copy thereof to his agent, and yet a judgment *in personam* was rendered against him, good everywhere if the statute is valid.

The state has plenary jurisdiction over all property, real or personal, within its limits, and may seize and subject it to the payment of the debts of the owners thereof, whether citizens of the state or not, upon such reasonable notice as the legislature may prescribe. But the power of the state personally to affect, by the judgments of its courts, citizens of another state, without personal service of process upon them within the state, is quite another matter. Prior to the decision in the case of *Pennoyer v. Neff*, 95 U. S. 714, it was the law of this state, and in some other jurisdictions, that, if a nonresident defendant had property in this state, its courts had jurisdiction, without seizing it, to proceed by publication of the summons, and render a judgment *in personam*, valid within the state to the extent of any property of the defendant therein. *Stone v. Myers*, 9 Minn. 287 (303); *Cleland v. Tavernier*, 11 Minn. 126 (194). Such, however, is not now the law, for a statute authorizing such a proceeding would not be due process of law. *Kenney v. Goergen*, 36 Minn. 190, 31 N. W. 210; *Lydiard v. Chute*, 45 Minn. 277, 47 N. W. 967; *Plummer v. Hatton*, 51 Minn. 181, 53 N. W. 460.



*Pennoyer v. Neff* is the leading authority in support of the now well-settled proposition that, except as to proceedings affecting the personal status of the plaintiff, or *in rem*, or as to actions to enforce liens, or to quiet title, or to recover possession of property, or for the partition thereof, or to set aside fraudulent transfers thereof, or to obtain judgment enforceable against property seized by attachment or other process, no state can authorize its courts to compel a citizen of another state remaining therein to come before them and submit to their decision a mere claim upon him for a money demand, no matter what the prescribed mode of service of process against him may be. An attempt to do so is not due process of law. 2 Freeman, Judgm. §§ 564-567; *Hart v. Sansom*, 110 U. S. 151, 3 Sup. Ct. 586; *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557; *De La Montanya v. De La Montanya*, 112 Cal. 101, 44 Pac. 345, 53 Am. St. Rep. 165, and notes 181.

Now, unless the fact that a nonresident natural person does business in this state which is in charge of an agent creates an exception to this rule, the act here under consideration is unconstitutional as to such a party. Clearly, such a case is not an exception to the rule, for the mere fact that a natural person carries on business in this state by an agent cannot affect the question of the jurisdiction of our courts over him personally. The court may seize his property within the state by its process, and, upon such reasonable constructive notice to him as the legislature may direct, apply the property to the payment of his debts; but the legislature cannot declare that to be personal service on a citizen of another state, not actually found within the state, which is not so in fact. Such nonresident person, unlike a corporation, carries on business in this state not by virtue of its consent, but by virtue of the federal constitution which guarantees to the citizens of each state all privileges and immunities of citizens of the several states; hence it cannot be implied from the fact that he does business within the state that he consents to submit himself to the jurisdiction of its courts in personal actions upon service of process on his agent. He submits his property which he sends into the state to the jurisdiction of its courts, but not his person. *Caldwell v. Armour*, 1 Pennewill, 545, 43 Atl. 517; *Brooks v. Dun* (C. C.), 51 Fed. 138. In each of the cases cited it was held that a statute which authorized service of summons, in a personal action, on a nonresident natural person to be made on his agent in charge of his business within the state, was unconstitutional, because it was in violation of section 2, article 4, of the federal constitution, and of section 1 of the fourteenth



amendment. See also *Ralya Market Co. v. Armour & Co.* (C. C.), 102 Fed. 530.

We are of the opinion, and so hold, that so much of Laws 1901, c. 278, as provides for the service of the summons in a personal action against a natural person who is a citizen of another state carrying on business in this state without a seizure of his property by the process of the court, is unconstitutional. It follows that the defendant in this case was entitled to have the judgment against him set aside as void.

It is therefore ordered that the order appealed from be reversed, and the case remanded, with directions to the municipal court to grant the defendant's motion to set aside the judgment.<sup>1</sup>

MONTGOMERY, JONES & COMPANY v. LIEBENTHAL  
& COMPANY.

COURT OF APPEAL. 1898.

[Reported (1898) 1 *Queen's Bench*, 487.]

A. L. SMITH, L. J.<sup>2</sup> In my opinion this appeal fails. The defendants applied at chambers to set aside the service of the writ of summons upon them. The answer of the plaintiffs to that application is that the defendants have agreed that the writ should be served in the way in which it has been served, and that such service should be equivalent to personal service on them. The facts are these. The plaintiffs are corn merchants carrying on business in Liverpool, and the defendants are corn merchants resident and carrying on business in Scotland. The defendants agreed to sell a cargo of wheat to the plaintiffs, and the contract contains a stipulation that all disputes arising out of the contract should be referred to two arbitrators, subject to an appeal to the Committee of Appeal of the London Corn Trade Association. The contract also contains a clause that any party to it residing or carrying on business either in Scotland or Ireland shall for the purpose of such proceedings be considered as ordinarily resident or carrying on

<sup>1</sup> *Aikmann v. Sanderson & Porter*, 122 La. 265, 47 So. 600, *accord.* *Guenther v. American Steel Hoop Co.*, 116 Ky. 580, 76 S. W. 419, *contra.* Compare *Alaska Commercial Co. v. Debney*, 144 Fed. 1; *Lowrie v. Castle*, 198 Mass. 82, 83 N. E. 1118; *Green v. Snyder*, 114 Tenn. 100, 84 S. W. 808. See 19 *Eneye.* of Pl. and Pr. 649. — Ed.

<sup>2</sup> The concurring opinions of Chitty and Collins, L. JJ., as well as the statement of facts, are omitted. — Ed.

business at the office of the London Corn Trade Association, and the contract goes on to provide that "service of proceedings upon a party residing or carrying on business in Scotland or Ireland, by leaving the same at the office of the London Corn Trade Association, together with the posting of a copy of such proceedings to the address in Scotland or Ireland, shall be deemed good service," *i. e.* good personal service. In the first place, it seems to me to be clear that the expression "service of proceedings" includes the service of a writ. That being so, the service contemplated by the contract is service at the office of the London Corn Trade Association. That does not mean, as has been suggested, that the writ may be served by merely pushing it under the door of the office or doing anything of that sort. It means that the writ must be left with some person at the office, as was done in this case. The service was therefore effected at the office in accordance with the contract. After the service had been so effected, a letter containing a copy of the writ was, in accordance with the contract, posted to the defendants in Scotland to inform them that the writ had been served. The question arises whether that agreement as to service is or is not a valid agreement. The writ, as I have said, has been served in the manner in which the parties agreed that it should be served. The defendants, nevertheless, say that there has been no effective personal service upon them, because the agreement as to service is invalid. To my mind that point is not tenable. I can see nothing in the rules to prevent the parties from agreeing to such a course of proceedings, and I can find no case in the books which shews that such an agreement as that made in this case is invalid. The case of *Tharsis Sulphur Co. v. Société Industrielle des Métaux*, 58 L. J. (Q. B.) 435, 60 L. T. 924, is an authority in support of the proposition that the parties can, as regards the mode of service, contract themselves out of the rules, and may appoint a person as agent to accept service, so long as they do not ask the Court to do something which it is prohibited from doing under the rules. In the present case no application was made to the Court for leave to serve the writ in the manner agreed upon, nor was any application necessary. The case of *British Wagon Co. v. Gray*, [1896] 1 Q. B. 35, was relied upon by defendants. That decision went upon Order x1, r. 1 (*e*), which deals with service out of the jurisdiction. That rule allows service of a writ out of the jurisdiction where the action is founded on any breach within the jurisdiction of any contract wherever made, which according to the terms thereof ought to be performed within the jurisdiction; but the last clause

expressly prohibits the rule from being applicable in the case of a defendant who is domiciled or ordinarily resident in Scotland or Ireland. The plaintiffs in *British Wagon Co. v. Gray*, [1896] 1 Q. B. 35, applied, and had to apply, for leave to serve the writ on the defendant, who was resident in Scotland, on the ground that he had agreed to be served in Scotland; but Mathew, J., at chambers refused leave on the ground that the rule expressly forbade such an order being made by the Court, and that the existence of the agreement could make no difference; and this Court affirmed his decision upon that ground. The pith of that case is well summed up by Lopes, L. J., where he says that "assuming the contract had the effect which it is contended that it had, I think it is clear that the parties had no power to contract that the Court should have a jurisdiction which is forbidden by the rules." Lord Esher, M.R., said that "the Court can take no notice of such an agreement, and can only order service of the writ in the manner allowed by the rules, and not in any other manner upon which the parties may agree." With that I entirely agree; but that is not this case. There is no application to the Court in this case to do something which it is forbidden by the rules to do. This case comes within the decision in *Tharsis Sulphur Co. v. Société Industrielle des Métaux*, 58 L. J. (Q. B.) 435, 60 L. T. 924, which I think is a right decision. The appeal must, therefore, be dismissed.

*Appeal dismissed.*<sup>1</sup>

<sup>1</sup> Jurisdiction may be conferred by implied as well as by express consent. See *Copin v. Adamson*, L. R. 9 Exch. 345; *Feyerick v. Hubbard*, 71 L. J. K. B. 509; *Emanuel v. Symon* (1908), 1 K. B. 302.

A statute is constitutional which provides that the plaintiff in an action who is not an inhabitant of, or cannot be found within the state, shall be held to answer to a cross action by the defendant, if the demands in the two cases are such that the judgments or executions can be set off against each other, and that the writ in such cross action may be served on the person who appears as the attorney of the plaintiff in the original action. *Aldrich v. Blatchford*, 175 Mass. 369, 56 N. E. 700; *Arkwright Mills v. Aultman, etc., Co.*, 128 Fed. 195. — Ed.

ALLURED *v.* VOLLER.

SUPREME COURT OF MICHIGAN. 1895.

[Reported 107 *Michigan*, 476.]

ON the third of November, 1892, the plaintiff commenced suit in the Osceola Circuit Court against one Elbert D. Pierson. There was no return of service upon Pierson, but the following acceptance of service was filed, and the genuineness of the signature proved by affidavit:

“ FLINT, MICH., 11-8-1892.

“ I, Elbert D. Pierson, defendant in the within attached summons, do hereby accept service of the same this 11th day of November, 1892, and hereby waive formal service by an officer, and allow the plaintiff herein named to proceed with the case, the same as though service had been made as commanded in said summons.

“ Signed in the presence of

“ LIZZIE PIERSON.

(Signed)

“ ELBERT D. PIERSON.”

The plaintiff obtained judgment against Pierson and a levy was made on a certain parcel of land and a sale was subsequently made thereunder to the plaintiff. The defendant in the present action subsequently procured a quitclaim deed of the same land from Pierson and the plaintiff brought this action of ejectment therefor. The plaintiff recovered judgment and the defendant appeals.<sup>1</sup>

MONTGOMERY, J. . . . The authorities are not harmonious on the question of the effect of a mere acceptance of a service of a writ beyond the jurisdiction of the court. Perhaps by the weight of authority such acceptance operates as evidence of a service at the place where such acceptance is indorsed, and has no greater effect than proof of an actual service made at that place. 2 *Enc. Pl. & Prac.* 638, and cases cited. But see *Vermont Farm Machine Co. v. Marble*, 20 *Fed.* 117; *Cheney v. Harding*, 21 *Neb.* 65; *Johnson v. Monell*, 13 *Iowa*, 300.<sup>2</sup> But in the present case the indorsement

<sup>1</sup> The statement of facts is taken from the opinion and is somewhat abridged. A part of the opinion is omitted. — Ed.

<sup>2</sup> For the effect of acknowledgment of service within the jurisdiction, see *Franklin v. Conrad-Stanford Co.*, 137 *Fed.* 737; *Purcell v. Bennett*, 68 *N. J. L.* 519, 53 *Atl.* 235; *Stoddard Mfg. Co. v. Mattice*, 10 *S. D.* 253, 72 *N. W.* 891. As to acknowledgment made outside the jurisdiction, see *Richardson v. Smith*, 11 *Allen (Mass.)*, 131; *Jones v. Merrill*, 113 *Mich.* 433, 71 *N. W.* 838; *Litchfield v. Burwell*, 5 *How. Pr. (N.Y.)*, 341; *White v. White*, 66 *W. Va.* 79, 66 *S. E.* 2, 135 *Am. St. Rep.* 1013. Compare *Godwin v. Monds*, 106 *N. C.* 448, 10 *S. E.* 1041. See 32 *Cyc.* 450; 19 *Encyc. of Pl. and Pr.* 697. — Ed.



on the summons was something more than an acceptance of service. It contained a stipulation that plaintiff might "proceed with the case the same as though service had been made as commanded in said summons"; that is, in the county. If an appearance may operate to waive service, as is universally held, it is difficult to understand why an agreement to waive service, duly signed, and evidently intended to be filed in the case, may not and should not have a like effect. It has been held that the admission of service is, if accompanied by an agreement to enter an appearance, sufficient to confer jurisdiction, even though such agreement be made beyond the territorial jurisdiction of the court. *Keeler v. Keeler*, 24 Wis. 525; *Shaw v. Bank*, 49 Iowa, 179. See, also, cases cited above. . . .

*Judgment affirmed, with costs.*<sup>1</sup>

LONG, GRANT, and HOOKER, JJ., concurred. McGRATH, C. J., did not sit.

# CONTINENTAL NATIONAL BANK *v.* THURBER AND OTHERS.

SUPREME COURT OF NEW YORK, GENERAL TERM. 1893.

[Reported 74 *Hun*, 632.]<sup>2</sup>

FOLLETT, J.<sup>3</sup> This action was brought to recover of the appellant the amount due on a bill of exchange, dated January 18, 1893, drawn and payable at the city of New York, and indorsed by the defendant at that city. When the bill was drawn the defendant was, and has ever since remained, a resident citizen of this State. The summons in this action was issued August 10, 1893, and on the twenty-third of the same month an order for the substituted service of it on the defendant was granted, pursuant to section 435 of the Code of Civil Procedure.<sup>4</sup>

<sup>1</sup> As to the effect of a voluntary appearance, see Chapter III, *infra*. As to judgments by confession, see Chapter X, *infra*. — ED.

<sup>2</sup> The order of the General Term was affirmed without opinion in the Court of Appeals, 143 N. Y. 648. — ED.

<sup>3</sup> A part of the opinion relating to a motion to vacate the order for substituted service, and the opinion delivered at Special Term, are omitted. — ED.

<sup>4</sup> The sections of the New York Code of Civil Procedure referred to in the principal case are as follows:

"Sec. 435. Where a summons is issued in any court of record, an order for the service thereof upon a defendant residing within the State may be



August 23, 1893, the summons and order were served on the defendant by leaving copies of them at his residence with a person of proper age, pursuant to said order and section 436 of the Code. The defendant failed to appear in the action, and September 16, 1893, judgment was entered against him, which he moved to vacate on the following grounds:

"1. That the court had not, at the date the said order for substituted service was made, nor at the date said judgment was rendered, jurisdiction over the person of said Horace K. Thurber.

"2. That said judgment, being a personal judgment, is void, as there has been no personal service of the summons herein upon said Horace K. Thurber.

"3. That section 435 of the New York Code of Civil Procedure, under which said order for substituted service was made, is unconstitutional, being contrary to the provisions of article V and article XIV of the amendments to the Constitution of the United States.

"4. That said judgment was so rendered against said Horace K. Thurber without due process of law."

The motion was denied and said defendant appeals from the order. The appellant's sole point, which he has divided into four, is that the court did not acquire jurisdiction to render a personal judgment against him, not because all of the steps required by the Code were not duly taken, but because the legislation establishing the procedure for the substituted service is violative of the provision of the Constitutions of the United States and of this State, that a person shall not be deprived of his property without due pro-

made by the court or a judge thereof, or the county judge of the county where the action is triable, upon satisfactory proof, by the affidavit of a person, not a party to the action, or by the return of the sheriff of the county where the defendant resides, that proper and diligent effort has been made to serve the summons upon the defendant, and that the place of his sojourn cannot be ascertained, or, if he is within the State, that he avoids service, so that personal service cannot be made.

"Sec. 436. The order must direct, that the service of the summons be made, by leaving a copy thereof, and of the order, at the residence of the defendant, with a person of proper age, if upon reasonable application, admittance can be obtained, and such a person found who will receive it; or, if admittance cannot be so obtained, nor such a person found, by affixing the same to the outer or other door of the defendant's residence, and by depositing another copy thereof, properly inclosed in a post-paid wrapper, addressed to him, at his place of residence, in the post-office at the place where he resides."

In 1896 (L. 1896, c. 562) sec. 436 was amended by adding at the end "or upon proof being made by affidavits that no such residence can be found, service of the summons may be made in such manner as the court may direct."

— Ed.

ess of law. A citizen of a State is bound by its laws, both substantive and those regulating judicial procedure. Acquiring jurisdiction of resident defendants by constructive service of process is a proceeding according to the course of the common law, and is due process of law. This kind of service was not unknown to the common law, but was an authorized mode by which the English courts of law, and of equity, from the earliest times acquired jurisdiction of resident defendants. 3 Black. Com. 383, 445.

Anciently, if a citizen refused to appear and answer to the process of the courts of England he was outlawed and his property taken to satisfy the just demands of his creditors. 2 Reeves' Hist. Eng. Law [Finlason's ed.], 308; 6 Bracton [Twiss' ed.], 477, *et seq.*; 2 Selton's Pr. [1st Am. ed.], 277.

In this State outlawries in personal actions were regulated by chapter 9 of the Laws of 1787, and the practice in such cases is stated in chapter 10 of Wyche's Practice, the first work published on the procedure of the courts of this State.

Every sovereignty has power to regulate the procedure of its courts and prescribe the rights which plaintiffs may acquire and the liabilities which may be imposed on resident defendants by judgments recovered in its tribunals. *Hunt v. Hunt*, 72 N. Y. 217; *Rigney v. Rigney*, 127 id. 408; *Mackay v. Gordon*, 34 N. J. Law, 286; *Piggott*, For. Judg. 130; *Schibsby v. Westenholz*, L. R. [6 Q. B.] 155.

In the case last cited Lord BLACKBURN said: "Now, on this we think some things are quite clear on principle. If the defendants had been, at the time of the judgment, subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been, at the time when the suit was commenced, resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them." This was said in an action brought to recover on a judgment recovered against the defendants in France. The defendants were not domiciled in France nor subject to the jurisdiction of the French court. They had no notice nor knowledge of the proceedings, and did not appear in the action. All countries having judicial systems provide modes by which resident citizens can be bound by the judgments of its courts without personal service of the process, and

abstracts of the statutes of many States and countries will be found in Piggott on Judgments. . . .

The orders should be affirmed, with ten dollars costs on each appeal.<sup>1</sup>

VAN BRUNT, P. J., and PARKER, J., concurred.

CLEARWATER MERCANTILE COMPANY *v.*  
ROBERTS *et al.*

SUPREME COURT OF FLORIDA. 1906.

[Reported 51 *Florida*, 176.]

COCKRELL, J.<sup>2</sup> This writ of error is prosecuted to review the denial of a motion to vacate a personal judgment against a domestic corporation consequent upon a default for want of appearance, the service having been made pursuant to section 1024 of the Revised Statutes. It is admitted that the provisions of the section were complied with strictly but it is insisted that the said section is unconstitutional, in that it authorizes a personal judgment without personal service and therefore does not constitute due process of law.

The statute originally enacted in 1853, Chapter 539, sec. 1, and brought forward in the Revised Statutes of 1892, reads:

<sup>1</sup> A personal judgment against a resident may be valid although he was not personally served with process within the state. *Nelson v. C. B. & Q. R. R. Co.*, 225 Ill. 197, 80 N. E. 109, 8 L. R. A. (N. S.), 1186, 116 Am. St. Rep. 133 (service by publication); *Sturgis v. Fay*, 16 Ind. 429, 79 Am. Dec. 440 (service by leaving copy at last place of residence). But see *De la Montanya v. De la Montanya*, 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165 (service by publication); *Raher v. Raher*, 150 Ia. 511, 129 N. W. 494, 35 L. R. A. (N. S.), 292 (service outside the state).

The courts of other jurisdictions will recognize the validity of such a judgment. *Schibbsby v. Westenholz*, L. R. 6 Q. B. 155, 161 (*semble*); *Ouseley v. Lehigh Valley Trust Co.*, 84 Fed. 602; *Bryant v. Shute's Ex'or*, 147 Ky. 268, 144 S. W. 28 (service by leaving copy at last place of residence); *Harryman v. Roberts*, 52 Md. 64 (service by leaving copy at last place of residence); *Henderson v. Stanford*, 105 Mass. 504, 7 Am. Rep. 551 (service outside the state). But compare *Grubel v. Nassauer*, 210 N. Y. 1113, 103 N. E. 1113 (service by publication, on one who was a subject of, but who was not domiciled in the country in which the judgment was rendered). And see *Chicago Title & Trust Co. v. Smith*, 185 Mass. 363, 70 N. E. 426.

The provisions of the statutes allowing service on residents other than personal service, must be strictly complied with. *Park Land, etc., Co. v. Lane*, 106 Va. 304, 55 S. E. 690. — Ed.

<sup>2</sup> The statement of facts is omitted. — Ed.

“ 1024. Service upon domestic corporation in the absence of officers or agents. — When process against any corporation of this State cannot be served owing to the failure of said corporation to elect officers or appoint agents, their absence from the State for the period of six months before the issuing of said writ, or because they are unknown, it shall be the duty of the officer to return said writ, with the causes of his inability to serve the same, and upon the return of said writ as aforesaid, the judge of the court from which the same shall have issued shall make an order at any time, setting forth the names of the parties, the nature of the action, suit or other proceeding, the court in which the same has been instituted, and requiring the said corporation to appear and defend the said action, suit or other proceeding, and the publication of said order once a week for the space of two months in some newspaper published in the county in which said action, suit or other proceeding shall be instituted, shall be a full and sufficient notification to the said corporation of the institution of said action, suit or other proceeding. However no judgment by default or decree *pro confesso* shall be taken or rendered against said corporation until due proof shall have been made of the publication of said order, as hereinbefore provided.”

The transcript before us is scant but we feel safe in holding that the plaintiff in error, now attacking this statute, was created by the authority of the State subsequent to 1853, and received its charter subject to all valid general laws applicable to domestic corporations.

It may be remarked incidentally that no contention is made that notice of the institution of the action was not actually received nor that the venue was improperly laid in a county other than the one in which under its charter the principal office of the corporation was located.

Assuming then these conditions was it competent in the legislature to provide as to a domestic corporation, when it fails to put forth officers or agents upon whom service may be made, that by reason of such failure it shall be brought into court by publication, with proper precautions as to the ascertainment of the essential facts by the court in advance of any judgment? We answer in the affirmative.

We are dealing not with natural persons, who create the governments, but with the fictitious entities, called corporations, which are created by the government, deriving therefrom their very existence, with such limitations as the creating power may impose, except only such limitations as may be expressly or by clear implications forbidden by its organic law or by the federal authority.



No provision of the State Constitution is pointed out to us that inhibits such limitations nor do we think that the due process clause of the federal constitution is thereby violated. The great case of *Pennoyer v. Neff*, 95 U. S. 715, expressly disclaims an intention to apply the principles there enunciated to the conditions before us, and while we entertain a high respect for the justice pronouncing the opinion in the case of *Bernhardt v. Brown*, 118 N. C. 700, 24 S. E. Rep. 527, and may agree to the result therein reached, yet much of the reasoning is inapplicable to the case before us and the principle controlling us — that is the power of the State over its own creatures, is not discussed in the cited opinion. See note on this case in 50 L. R. A. p. 586.

To say in the instant case that no property of the corporation may be found within the State upon which an execution may attach, means only that the judgment may be futile not that it is void, and the statute confers upon the creditor the privilege of accepting that chance as to a domestic corporation which can hold property only by the will of the State.

Strictly speaking there can be no personal service upon a corporation, but only such constructive or substituted service as the law may provide. It is not unusual to provide as to certain kinds of non-resident corporations, that they may come into a State only on condition that service of process upon some State officer shall bind them personally; and we do not recall any decision holding that such service does not constitute due process of law. Generally service is made upon the principal officer of a corporation who may be found; this is constructive service strictly speaking, yet upon such service personal judgments are daily rendered. The fundamental object of all laws relating to service of process is to give that notice which will in the nature of things most likely bring the attention of the corporation to commencement of the proceedings against it and when legislation carries out this clear design it should not be stricken down by the courts.

A case directly in point is *Town of Hinckley v. Kettle River R. R. Co.*, 70 Minn. 105, 72 N. W. Rep. 835. See, also, *Continental National Bank of Boston v. Thurber*, 74 Hun. 632, affirmed in 143 N. Y. 648.

*The judgment is affirmed.*<sup>1</sup>

SHACKLEFORD, C. J., and WHITEFIELD, J., concur.

TAYLOR, HOCKER and PARKHILL, JJ., concur in the opinion.

<sup>1</sup> *Nelson v. C. B. & Q. R. R.*, 225 Ill. 197, 80 N. E. 109, 8 L. R. A. (n. s.), 1186, 116 Am. St. Rep. 133, *accord*.

So, too, a statute is constitutional, which provides for service outside the



## BRUNING v. BROTHERHOOD ACCIDENT COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1906.

[Reported 191 *Massachusetts*, 115.]

CONTRACT on a judgment obtained in the State of Indiana. Writ dated August 26, 1903.

In the Superior Court the case was tried before Wait, J., who at the close of the evidence ordered a verdict for the plaintiff for the amount of the Indiana judgment with interest, and reported the case for determination by this court. If the verdict was ordered properly, judgment was to be entered thereon for the plaintiff; if the direction was wrong, such verdict or judgment was to be entered as justice required.

KNOWLTON, C. J.<sup>1</sup> This is an action upon a judgment recovered by the plaintiff against the defendant in the State of Indiana. The only question argued before us is whether the judgment is void for want of jurisdiction in the court that rendered it, because there was no legal service upon the defendant. The service was made upon the auditor of the State of Indiana.

The defendant is a fraternal insurance company organized under the laws of Massachusetts, confining its membership to members of the Independent Order of Odd Fellows, and having its principal office in Boston. The action in Indiana was upon a policy of insurance, and the evidence was uncontradicted that, at the time when the policy was issued, the defendant was doing business in Indiana under a license from that State. Before the original action was brought the license had expired, and had not been renewed. The plaintiff put in evidence § 4914t of the statutes of Indiana, under the heading, "Mutual Life and Accident Com-

state on a domestic corporation. *Straub v. Lyman Land & Investment Co.*, (S. D., 1913) 141 N. W. 979.

Other methods of service on domestic corporations may properly be provided for by statute. *Hinckley v. Kettle River R. R. Co.*, 70 Minn. 105, 72 N. W. 835.

The method must be such as is reasonably calculated to give the corporation notice and an opportunity to defend. *Pinney v. Providence Loan & Inv. Co.*, 106 Wis. 396, 82 N. W. 308, 50 L. R. A. 577.

In the absence of statutory provisions, jurisdiction over a domestic corporation is obtained by service of process on its head officer. See *Kansas City, etc., R. R. Co. v. Daughtry*, 138 U. S. 298, 305, 34 L. ed. 963, 11 S. Ct. 306; *State v. Western N. C. R. R. Co.*, 89 N. C. 584; 1 *Tidd's Practice*, 8th ed., 119.—ED.

<sup>1</sup> A part of the opinion is omitted. — ED.

panies," which is as follows: "All processes in any action or proceeding against any foreign corporation, association or society, doing business in this state under the provisions of this act, may be served upon the auditor of this state, and any lawful process against it which is served on the auditor of state, shall be of the same legal force and validity as if served on the corporation, association or society, and this provision shall continue in force so long as any liability remains outstanding against the corporation, association or society in this state, service upon such auditor of state shall be deemed sufficient service upon the principal." Inasmuch as the defendant saw fit to do business in Indiana under a license from the State, it was bound by all reasonable statutes relating to service for the purpose of giving jurisdiction to local courts. *Reyer v. Odd Fellows' Fraternal Accident Assoc.*, 157 Mass. 367. *Lafayette Ins. Co. v. French*, 18 How. 404. *St. Clair v. Cox*, 106 U. S. 350. *Gillespie v. Commercial Ins. Co.*, 12 Gray, 201. There is nothing to show that this statute is unreasonable, and it is therefore binding on the defendant. . . .

*Judgment on the verdict.*<sup>1</sup>

<sup>1</sup> See *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *Penn. L. Mut. Fire Ins. Co. v. Meyer*, 197 U. S. 407, 49 L. ed. 810, 25 S. Ct. 483; *Old Wayne Life Ass'n v. McDonough*, 204 U. S. 8, 51 L. ed. 345, 27 S. Ct. 236; *Commercial Mut. Acc. Co. v. Davis*, 213 U. S. 245, 53 L. ed. 782, 29 S. Ct. 445; *Firemen's Ins. Co. v. Thompson*, 155 Ill. 204, 40 N. E. 488; *Rothrock v. Dwelling-House Ins. Co.*, 161 Mass. 423, 37 N. E. 206, 23 L. R. A. 863, 42 Am. St. Rep. 418; *Beale, Foreign Corporations*, Chaps. VII, XI.

As to the jurisdiction of the courts of a state over foreign corporations doing business in the state, in the absence of statutes similar to that in the principal case, see *Wilson Packing Co. v. Hunter*, Fed. Cas. No. 17,852; *Middlebrooks v. Springfield Fire Ins. Co.*, 14 Conn. 301; *Desper v. Continental Water Meter Co.*, 137 Mass. 252. Compare *Compagnie Générale Transatlantique v. Law*, (1899) A. C. 431; *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 S. Ct. 354.

As to the effect of the corporation's ceasing to do business in the state, see *Mutual Reserve Fund Life Ass'n v. Phelps*, 190 U. S. 117, 47 L. ed. 987, 23 S. Ct. 707; *McCord Lumber Co. v. Doyle*, 97 Fed. 22; *Guthrie v. Connecticut Indemnity Ass'n*, 101 Tenn. 643, 49 S. W. 829.

On the question of what constitutes doing business in a state, see *Beale, Foreign Corporations*, Chapter VIII.

If an agent of a foreign corporation is fraudulently inveigled within the jurisdiction for the purpose of serving him with process, the service will be set aside. *Frawley, Bundy & Wilcox v. Penn. Casualty Co.*, 124 Fed. 259. — Ed.

KENDALL v. AMERICAN AUTOMATIC LOOM  
COMPANY.

SUPREME COURT OF THE UNITED STATES. 1905.

[Reported 198 *United States*, 477.]

THIS suit was brought in the Circuit Court of the United States for the Southern District of New York by the complainant, a citizen of New York, against the defendant, a corporation organized and existing under the laws of West Virginia. By the charter of the defendant corporation, the City of New York was designated as its principal office and place of business. The bill of complaint and a writ of subpoena were served in the City of New York upon the treasurer of the defendant corporation. The corporation had never engaged in business in the State of New York or elsewhere and had no assets in the State of New York, and no office or place of business there, and those of its officers who resided there were not there officially, or as representing any business or interest of the corporation. Some years before this suit was instituted, several meetings of the board of directors had been held in the City of New York. The Circuit Court granted a motion of the defendant to set aside the service. The complainant appealed.<sup>1</sup>

PECKHAM, J. . . . Regarding the case as properly here, the question is whether the service made upon the treasurer of the appellee corporation was a valid service upon the corporation itself. We think it was not. It is perfectly apparent that the corporation was, at the time of the service on the treasurer, doing no business whatever within the State of New York, and that it had never done any business there since it was incorporated in the State of West Virginia. While we have lately held that, in the case of a foreign corporation, the service upon a resident director of the State where the service was made was a good service where that corporation was doing business within that State, *Pennsylvania Lumbermen's &c. Co. v. Meyer*, 197 U. S. 407, yet such service is insufficient for a court to acquire jurisdiction over the corporation where the company was not doing any business in the State, and was situated like this company at the time of the service upon the treasurer. *Conley v. Mathieson Alkali Works*, 190 U. S. 406.

The order of the Circuit Court was right, and is *Affirmed*.<sup>2</sup>

<sup>1</sup> The statement of facts is abridged and a part of the opinion is omitted. — Ed.

<sup>2</sup> *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 S. Ct. 354; *Goldey v.*

## SADLER v. BOSTON &amp; BOLIVIA RUBBER COMPANY.

SUPREME COURT OF NEW YORK, APPELLATE DIVISION. 1910.

[Reported 140 *New York Appellate Division*, 367.]<sup>1</sup>

SCOTT, J. Defendant appeals from an order of the Special Term denying a motion to set aside and declare null and void the service of a summons upon the defendant, appellant.

One of the plaintiffs is a resident of the State of New York. The defendant is a foreign corporation, organized under the laws of the State of Maine; has never been authorized to do business in this State, and has never done business here, or maintained an office or agent here for the transaction of business, and has not now, nor had when the summons was served, any property within this State. The summons was attempted to be served upon defendant by delivery to its treasurer, a resident of Massachusetts, while he was in transit through this State on his way from England to his home. Was this service valid and did it bring the defendant within the jurisdiction of the courts of this State? This question is one upon which the decision of the Federal courts and the courts of this State have been in irreconcilable conflict for many years. Tested by the rule laid down in this State in *Pope v. Terre Haute Car Mfg. Co.*, 87 N. Y. 137, and never explicitly overruled or rescinded, the service was good, at least in so far as to confer jurisdiction of the defendant upon the courts of this State. Tested by the rule repeatedly laid down by the Supreme Court of the United States, the service was bad, and conferred no jurisdiction over the defendant upon any court. *Vide* cases cited by Mr. Justice CLARKE in *Grant v. Cananea Consolidated Copper Co.*, 117 App. Div. 576. Of course, we are bound to follow the rule of our own Court of

Morning News, 156 U. S. 518, 39 L. ed. 517, 15 S. Ct. 559; *Caledonian Coal Co. v. Baker*, 196 U. S. 432, 49 L. ed. 540, 25 S. Ct. 375; *Newell v. Great W. Ry. Co.*, 19 Mich. 336; *Moulin v. Insurance Co.*, 24 N. J. L. 222; *Aldrich v. Anchor Coal Co.*, 24 Ore. 32, 32 Pac. 756, *accord*.

On the question whether the courts of a state can obtain jurisdiction over a foreign corporation which has never been engaged in business in the state, by service of process on an agent who is in the state for the purpose of investigating or adjusting the claim upon which the suit is based, see *Louden Machinery Co. v. Amer. Mall. Iron Co.*, 127 Fed. 1008; *Premo Specialty Mfg. Co. v. Jersey-Creme Co.*, 200 Fed. 352, 3 L. R. A. (s.s.), 1015; *Painter v. Colorado Springs & C. C. D. Ry. Co.*, 127 Mo. App. 248, 104 S. W. 1139; *Fond du Lac C. & B. Co. v. Henningsen P. Co.*, 141 Wis. 70, 123 N. W. 640. — Ed.

<sup>1</sup> The order of the Appellate Division was affirmed by the Court of Appeals without opinion, 202 N. Y. 547. — Ed.



Appeals, unless that rule is violative of the provisions of the Federal Constitution, or the Court of Appeals has itself rescinded the rule in the Pope case and conformed to the rule laid down by the Supreme Court of the United States. The appellant contends for both of these propositions. We do not so understand the present attitude of the Court of Appeals. Its latest expression upon the subject is contained in *Grant v. Cananea Consolidated Copper Co.*, 189 N. Y. 241. In that case, after pointing out that the method of service now complained of is in strict conformity to the requirements of the Code of Civil Procedure (§ 432, subd. 1), the court said: "But it is contended that the provisions of the Code are violative of the provision of the Constitution of the United States, already referred to. This we cannot admit." But it is argued that in the *Grant* case itself the Court of Appeals has abandoned its former position and adopted that of the Supreme Court of the United States. This argument is based upon the following sentence from the opinion of the court: "While we entertain the view that our statute upon the subject furnishes the safer and wiser rule to follow we shall in this case recognize and attempt to follow the rule laid down by the Federal court." We are unable to find in this expression any indication of an intent to recede from the rule announced in the Pope case, where that rule is applicable. The application of the Federal rule is especially and significantly limited to the particular case then under consideration, and as we understand the sentence above quoted, it means nothing more than the facts of that case brought it even within the rule adhered to by the Federal courts. Being bound, as we are, to follow the rule of the Court of Appeals as we understand it, we are compelled to affirm the order appealed from.

The order should be affirmed, with ten dollars costs and disbursements.

INGRAHAM, P. J., MILLER and DOWLING, JJ., concurred.

CLARKE, J. (concurring):

The facts are on all fours with those presented upon a similar motion to set aside the service of the summons upon the same grounds in *Pope v. Terre Haute Car Mfg. Co.*, 87 N. Y. 137, where the Court of Appeals refused to grant the motion, retained jurisdiction and said: "A judgment to be rendered in an action thus commenced against a foreign corporation will be valid for every purpose within this State, and can be enforced against any property at any time found within this State. Its effect elsewhere need not now be determined." In *Grant v. Cananea Consolidated Copper*



Co., 117 App. Div. 576, I cited a long line of cases in the Supreme Court of the United States rendered after the decision in the Pope case, holding such service void and a judgment based thereon violative of section 1 of the 14th amendment of the United States Constitution. I believed then, and still believe, that a Federal question was involved and so we were bound by the rule laid down by the Supreme Court of the United States. But when the Grant case went to the Court of Appeals (189 N. Y. 241) that learned court said in reversing this court: "But it is contended that the provisions of the Code are violative of the provision of the Constitution of the United States, already referred to. This we cannot admit."

This court is intermediate, not final. The orderly administration of justice requires the subordination of individual views no matter how firmly fixed to those of our court of last resort, especially when they have once been fully stated and submitted to that tribunal for consideration.

Therefore, while my personal opinion is unchanged, namely, that the service here in question is bad and ought to be set aside, I vote to uphold it and to affirm the order appealed from upon the direct authority of the Pope case not weakened or modified by the Grant Case (*supra*).

*Order affirmed with ten dollars costs and disbursements.*<sup>1</sup>

## B. IN PROCEEDINGS *in Rem* AND *Quasi in Rem*.

### DE ARMAN *v.* MASSEY.

SUPREME COURT OF ALABAMA. 1907.

[Reported 151 *Alabama*, 639.]

MCCLELLAN, J.<sup>2</sup> This is an action sounding in damages for an alleged assault and battery committed by appellant on appellee. It was begun by attachment, upon the ground that defendant was an absconder, and there was no personal service had on the defendant. Failing to appear, judgment by default was entered, and on writ of inquiry the jury assessed the damages at \$2,200. Upon this finding the court rendered a personal judgment against the defendant for said sum and also condemned to sale the real estate

<sup>1</sup> *Jester v. Steam Packet Co.*, 131 N. C. 54, 42 S. E. 447, *accord.* — Ed.

<sup>2</sup> The statement of facts is omitted. — Ed.

levied on. It is, of course, fundamental that, without jurisdiction of the person obtained, a personal judgment against a defendant cannot be validly rendered. To secure such jurisdiction the rule was, prior to *Bank v. Clement*, 109 Ala. 270, 19 South. 814, that notice implied in the levy, and service of notice in the manner prescribed of the levy, though such notice was not personally served on the defendant, availed to bring the defendant within the lawful powers of the court. This rule proceeded on the idea that the proceeding in attachment or garnishment was by nature *in personam*. Whatever may have been the wisdom and soundness of such a rule, long enforced by the courts of this state, the theory of attachments, in keeping with which the mentioned rule obtained, was entirely changed when the Supreme Court of the United States, in a cause in which a nonresident was the party defendant, declared a proceeding in attachment or garnishment to be *in rem*, and not *in personam*. Accordingly, in *Bank v. Clement*, *supra*, this court yielding a proper influence to the announcement of the Supreme Court of the United States in a cause in which that court had superior and controlling jurisdiction, because of the nonresidence of a party therein, accepted the principle, and applied it in that case, viz., that without personal service a judgment *in personam* against a merely constructively served defendant or garnishee could not be validly rendered, but that the proceeding in attachment or garnishment being, in the absence of personal service, *in rem*, the power of the court in the given cause was strictly limited to the enforcement of the pressed demand by the subjection, if so entitled, of the property levied on to the satisfaction of the demand.

So we are not confronted with the alternative whether the rule established to the behoof of nonresidents shall be denied or applied to residents who are not personally served, but whose property is under the ban of process in attachment or garnishment in the courts of this state. The character of proceedings, attachment or garnishment, being fixed *in rem*, and not *in personam*, we think that the principle stated compels the conclusion that no jurisdiction to render a personal judgment can be validly acquired unless the service is personal and actual, rather than simply constructive. If any other view was entertained, an incongruous situation would result, to say nothing of the ignoring of the principle upon which the rule as to nonresidents is rested by the Supreme Court of the United States. To cling to the earlier rule followed in this state would extend to the nonresident an exception which our own courts

would deny to our own citizens. Independent of the principle and its consequent rule, common fairness, if its recognition imparts no other principle, demands that we make no insidious distinction against citizens of this state. It would be the creation of an insufferable anomaly to hold that in one class of cases such proceedings were *in rem*, and in another *in personam*. And it may be here generally observed that where, in attachment or garnishment proceedings, no personal service was had, the trial court should, in accordance with its practices, ascertain the damages or debt to which the plaintiff is entitled, and then render a judgment only in condemnation of the property subject to be sold, the proceeds thereof to be applied to the satisfaction *pro tanto* of the ascertained debt or damages. Care should be taken to avoid the rendition of a personal judgment in the premises. — *Bank v. Clement, supra*.

There having been no personal service on the appellant, defendant below, the judgment was erroneously rendered, and so it must be reversed, and the cause remanded. *Reversed and remanded*.<sup>1</sup>

TYSON, C. J., and DOWDELL and ANDERSON, JJ., concur.

BATES *v.* CHICAGO, MILWAUKEE & ST. PAUL  
RAILWAY COMPANY, Garnishee, etc.

SUPREME COURT OF WISCONSIN. 1884.

[Reported 60 *Wisconsin*, 296.]

TAYLOR, J.<sup>2</sup> After a careful consideration of the facts, and the arguments of the learned counsel for the respective parties, we have concluded that the learned circuit judge erred in refusing to instruct the jury as requested by the appellant, and also in rendering judgment in favor of the respondent upon the special verdict. . . .

<sup>1</sup> A personal judgment against a non-resident defendant whose property has been attached, but who has not been personally served with process within the state, is not valid. *Easterly v. Goodwin*, 35 Conn. 273; *Eastman v. Dearborn*, 63 N. H. 364. Compare *Emanuel v. Symon*, (1908) 1 K. B. 302. A few early cases intimating that jurisdiction over the defendant's property gives jurisdiction to pronounce a personal judgment against him, have, since the decision in *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, been discredited. *Laughlin v. Louisiana & New Orleans Ice Co.*, 35 La. Ann. 1184. See *Lydiard v. Chute*, 45 Minn. 277, 47 N. W. 967.

As to the effect of a subsequent attachment, see *Roberts v. Anheuser Busch Brewing Ass'n*, 215 Mass. 341, 102 N. E. 316. — Ed.

<sup>2</sup> The statement of facts and a part of the opinion are omitted. The

Notwithstanding the general language of our statute upon the subject of garnishment, that "any creditor shall be entitled to proceed by garnishment, in the circuit court of the proper county, against any person (except a municipal corporation) who shall be indebted to, or have any property whatever, real or personal, in his possession or under his control, belonging to such creditor's debtor, in the cases, upon the conditions, and in the manner prescribed in this chapter" (R. S., sec. 2752), — we feel constrained to hold that the personal property or real estate in his possession or under his control must be limited to personal property or real estate within this state, and that in the absence of any fraud or connivance on the part of the garnishee to aid the debtor in defrauding his creditors, personal property or real estate which is lawfully in the possession or under the control of the garnishee outside of this state is not the subject of garnishment under our statute. That personal chattels outside of the state, which, if within the state could be seized by attachment or execution, were not intended to be covered by the statute, is, we think, evident.

The attachment of the debtor's property before judgment has always been considered a harsh remedy in this state, but that writ can only reach the property of the debtor within the state. R. S., sec. 2738. The garnishee process is in the nature of an attachment, and was first used to attach the credits of the debtor and apply them to the payment of his debts, but it has been extended in this state so as to attach, without actual seizure, the personal property and real estate of the debtor in the possession or under the control of third persons, so as to apply such property to the payment of his debts. We do not feel called upon to give this statute, which is in its nature a harsh remedy, a construction which would give the courts under it the highest powers of a court of chancery, viz., the power to compel a debtor to surrender his property held within a foreign jurisdiction, to be applied to the payment of his debts within this state. If under this statute the circuit court can exercise this power, then any justice of the peace may, for the same language is used in the statute which gives the power to justices' courts over the garnishee process that is used with respect to circuit courts, except that it leaves out the words "or real estate." As to personal property the language is the same. R. S., sec. 3716.

circuit judge had refused to instruct the jury to find for the defendant if the goods in question were outside the state of Wisconsin at the time the garnishee summons was served; and had rendered judgment for the plaintiff although the jury found specially that the goods were outside the state at that time. — ED.



The statutes of this state, considered together and as one system, clearly indicate that the personal property which may be arrested in the hands of a garnishee must be within the state, so that it may be seized and sold to satisfy any judgment obtained against the principal debtor. Sec. 2762, R. S., relating to the proceedings in the circuit court, says: "If the answer disclose any money, credits, or other property, real or personal, in the possession or under the control of the garnishee, the officer having a writ of attachment or an execution, if any, may levy upon the interest of the defendant in the same; otherwise the garnishee shall hold the same until the order of the court thereon." The last clause of the section evidently relates to the cases where the garnishee is summoned in an action not commenced by attachment, and in such cases he must hold the property to await the judgment of the court in the principal action. The act giving jurisdiction of the proceedings to justices of the peace, provides as follows: "The justice shall enter an order in his docket, requiring the garnishee, within ten days, to pay or deliver to the justice such property, or the amount of such indebtedness, or so much thereof as may be necessary to satisfy such judgment; . . . and all property and effects, except money delivered to the justice, shall be by him ordered to be sold on the execution against the defendant." R. S., sec. 3725.

These provisions clearly indicate that the personal property to be reached in the hands of a garnishee is such as would be subject to seizure by the writ of attachment or execution, if they were in the possession of the principal debtor. It is unnecessary to intimate the difficulties and hardships which would result from the enforcement of a rule against garnishees compelling them to deliver up to the processes of the courts of this state any property they may have under their control, belonging to the principal debtor, situated in another state. The difficulty in the case at bar might not be great, because the property, although in fact out of the state when the garnishee summons was served, was not as distant from the place where the court was held, which issued it, as it might have been within the state. But the rule, if established, must be general, so that if property just beyond the line of the state may be reached, then property in Maine, Louisiana, or California, or in any foreign country, may also be reached and held. The difficulties and injustice of enforcing such a rule are apparent. The only case cited by the learned counsel for the respondent in which any court has held that personal property out of the state, in which the garnishee process was issued, could be reached and held by it, is *Childs*

*v. Digby*, 24 Pa. St. 23. That case was disapproved as bad law by the same court in *Penn. R. R. Co. v. Pennoek*, 51 Pa. St. 244. The position taken by us upon this question is approved by the Pennsylvania court in the case last cited, and also in the following cases: *Western R. R. v. Thornton*, 60 Ga. 300; *Sutherland v. Second Nat. Bank*, 78 Ky. 250; *Wheat v. P. C. & Ft. D. R. R. Co.*, 4 Kan. 370, 378; *I. C. R. R. Co. v. Cobb*, 48 Ill. 402; *Lawrence v. Smith*, 45 N. H. 533; *Tingley v. Bateman*, 10 Mass. 343, 346; *Clark v. Brewer*, 6 Gray, 320; *Young v. Ross*, 11 Foster, 201.

It is urged by the learned counsel for the respondent that the garnishee should be held for property in his control out of the state, because the court could enforce its order against the person of the garnishee, over whom it has jurisdiction, in like manner as a court of equity sometimes enforces a contract between the parties to the action to convey lands situated in another state. Our answer to that argument is, as stated above, that it is clear that the legislature did not intend to confer these high equity powers upon the courts having jurisdiction of the garnishee process. It is unnecessary, therefore, to discuss the question of the power of the legislature to confer upon the courts of this state the authority to appropriate the personal property or real estate of a debtor, situate in another state or foreign country, to the payment of his debts in this state. . . .

*By the Court.* The judgment of the circuit court is reversed, and the cause remanded with instructions to that court to enter a judgment upon the special verdict in favor of the garnishee defendant.<sup>1</sup>

NICHOLS *v.* HOOPER *et al.*

SUPREME COURT OF VERMONT. 1889.

[Reported 61 *Vermont*, 295.]

THIS was an action of general assumpsit, heard before the Municipal Court for the village of Rutland, September 3, 1888, Lawrence, J. Plea, the general issue, and trial by the court.

The plaintiff sought to recover the amount of a promissory note, executed and made payable in the State of New York. The parties were all residents of the State of New York, except the trustee.

<sup>1</sup> As to garnishment of a carrier holding goods within the state, see *Adams v. Scott*, 104 Mass. 164; *Stevenot v. Eastern Ry. Co.*, 61 Minn. 104, 63 N. W. 256, 28 L. R. A. 600. As to attachment in such case, see *Clifford v. Brockton Transportation Co.*, 214 Mass. 466, 101 N. E. 1092. — Ed.

The writ was served on the trustee July 27th. On the 24th day of July the debt due from the trustee had been assigned by the defendant to S. C. Hooper, claimant in this suit, but the trustee did not receive notice of this assignment until July 29th. On the 27th of July the defendant made, in the State of New York, a general assignment for the benefit of creditors to the claimant, Hodgeman, but no notice of this latter assignment was given the trustee.

Upon these facts the court rendered judgment, *pro forma*, for the plaintiff, and that the trustee was chargeable, to which the defendants and claimants excepted.

TART, J. The plaintiff, defendant and claimants reside in New York; the debt the plaintiff is seeking to recover, and the one due the principal defendant from the trustee, were contracted, and, in law, are payable in New York. The trustee resides in this State and can be held liable, although the parties reside elsewhere, and the debt was contracted and payable elsewhere. *Towle v. Wilder*, 57 Vt. 622, is cited by claimants. No opinion was written; we do not know upon what point the case turned, and see no reason for following it. The claimants attempt to hold the funds in the trustee's hands by virtue of assignments of the debt; one executed prior to the service of the trustee process, the other a general one for the benefit of creditors, on the day of the service. The trustee did not receive notice of the assignments prior to the service of the trustee process upon him. The assignments were valid, but are not operative against the trustee process, notice of the assignments not having been given to the trustee by the assignees. Such notice was necessary to save the debt from the trustee process. It is needless to cite cases to show the necessity of such notice.

*Judgment affirmed.*<sup>1</sup>

<sup>1</sup> See on the matter of jurisdiction for purposes of garnishment, *Chicago, etc., Ry. Co. v. Sturin*, 174 U. S. 710, 43 L. ed. 1144, 19 S. Ct. 797; *Harris v. Balk*, 198 U. S. 215, 49 L. ed. 1023, 25 S. Ct. 625, 3 Ann. Cas. 1084; *Shuttleworth & Co. v. Marx & Co.*, 159 Ala. 418, 49 So. 83; *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592, 46 N. E. 631; *Bullard v. Chaffee*, 61 Neb. 83, 84 N. W. 604, 51 L. R. A. 715; *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209, 33 N. E. 938. — Ed.

## CLOYD v. TROTTER.

SUPREME COURT OF ILLINOIS. 1886.

[Reported 118 *Illinois*, 391.]

SCOTT, C. J.<sup>1</sup> The bill in this case was brought in the circuit court of Wayne county, by William Trotter, against James C. Cloyd, and was to remove a cloud from the title to property which complainant claimed to own. A decree was rendered in accordance with the prayer of the bill, and as the title to the property is involved, defendant brings the case directly to this court on error, as he is authorized by law to do.

No question is raised on the bill, and the assignment of errors does not make any discussion of the merits of the case necessary. Defendant is a non-resident of the State of Illinois, and the service upon him was by a service of a copy of the bill upon him, at his residence in the city of New York. It is objected, the service was insufficient, and as there was no appearance by defendant, or by any solicitor for him, the court had no jurisdiction to render the decree it did. Section 14 of the Chancery act (Rev. Stat. 1874, p. 200), provides: "The complainant may cause a copy of the bill, together with a notice of the commencement of the suit, to be delivered to any defendant residing or being without this State, not less than thirty days previous to the commencement of the term at which such defendant is required to appear, which service, when proved to the satisfaction of the court, shall be as effectual as if such service had been made in the usual form within the limits of this State." . . .

The third error of the series, viz., the court erred in entering a personal judgment against defendant for costs, and in awarding execution against him for the collection of the same, seems to be well assigned. There was no appearance in the court below, either by defendant, or any solicitor for him, and it is not perceived how that court obtained jurisdiction of his person so as to render a personal decree against him, for costs or otherwise, and to award execution against him as for the collection of a personal money decree. So far as the property situated within the jurisdiction of the court is involved, the court had jurisdiction to decree concerning it, and defendant, and all parties claiming through or under him, would

<sup>1</sup> A part of the opinion is omitted. — Ed.



be bound. But that fact gave no jurisdiction to the court to render a personal money decree against him, as the court might do if defendant had been within its jurisdiction. It affirmatively appears in this case, defendant resided in another State. Treating the service by copy of the bill, and notice of the commencement of the suit, as effectual "as if such service had been made in the usual form within the limits of this State," as the Statute provides shall be done, still such service does not confer jurisdiction on the court, of the person of defendant, so as to enable it to render a personal money decree against him, to be collected by execution. No one will insist the court could send its process out of the State, and by proof of service within a foreign State acquire jurisdiction over the person of defendant, so as to render a personal money decree against him. It is so obvious it need not be stated, that persons residing or being without the limits of this State cannot be subjected to the jurisdiction of the local courts by the service of process or other service upon them at the place of their domicile.

The decree of the circuit court, so far as it adjudged costs against defendant, and awarded execution for the collection of the same, will be reversed in this court, but in all other respects it will be affirmed; and as he ought, on account of the wrongful conduct alleged against him in the bill, to pay such costs, plaintiff in error will be required to pay all costs in this case in this court.

*Decree reversed in part and in part affirmed.*<sup>1</sup>

MAGRUDER and CRAIG, JJ., dissent from so much of the foregoing opinion as reverses the judgment for costs.

<sup>1</sup> When the court has jurisdiction of the *res* (property or status) but not of the person of the defendant, the judgment so far as it operates *in rem* is upheld, but so far as it attempts to impose a personal liability on the defendant it is invalid. *Dewey v. Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 S. Ct. 379; *Beard v. Beard*, 21 Ind. 321; *Elmendorf v. Elmendorf*, 58 N. J. Eq. 113, 44 Atl. 164; *Schwinger v. Hickok*, 53 N. Y. 280, *accord*. But compare *Phillips v. Batho*, (1913) 3 K. B. 25.

On the other hand, the court cannot render a valid judgment *in rem* where the property is outside the jurisdiction.

As to service of summons by publication in case of unknown persons, see *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918, 10 S. Ct. 557; *Ballard v. Hunter*, 204 U. S. 241, 51 L. ed. 461, 27 S. Ct. 261; *Birmingham Realty Co. v. Barron*, 150 Ala. 232, 43 So. 346; *Guise v. Early*, 72 Ia. 283, 33 N. W. 683; *Tyler v. Judge*, 175 Mass. 71, 55 N. E. 812; *Ingle v. Welles*, 53 Minn. 197, 55 N. W. 117; *McClymond v. Noble*, 84 Minn. 329, 87 N. W. 838, 87 Am. St. Rep. 354; *Pier v. Lockwood*, 30 Hun. (N. Y.), 6.

The statutory provisions as to constructive service must be strictly complied with. *Correll v. Greider*, 245 Ill. 378, 92 N. E. 266, 137 Am. St. Rep.

SECTION III.

*Return of Service.*

MIEDREICH v. LAUENSTEIN.

SUPREME COURT OF THE UNITED STATES. 1914.

[Reported 232 *United States*, 236.]

DAY, J.<sup>1</sup> The plaintiff in error, by complaint filed in the Superior Court of Vanderburgh County, State of Indiana, sought to vacate a judgment of foreclosure rendered by that court in a prior case and to be permitted to redeem the property therein involved and prays for other relief, and, judgment having been entered in favor of the defendant in error, which was affirmed by the Supreme Court of Indiana (172 Indiana, 140), this writ of error was sued out.

The facts, so far as pertinent to our review, are: The complaint, in the fourth paragraph, alleged that the plaintiff in error was the owner of certain property, subject to a mortgage foreclosed in a former suit; that she was a minor when the foreclosure proceedings were had; that she was not a resident of Vanderburgh County, where the action was brought, but was and had been for many years a resident of Gibson County, and that she was not summoned in such action, had no knowledge of its pendency, and did not waive service or enter her appearance therein. It was further alleged that the plaintiff in error was not amenable to the jurisdiction of the sheriff of Vanderburgh County, but that, although she was not served with process, he made a false return of a pretended summons, by which the court was wrongfully imposed upon, and, being so advised, at the instance of attorneys for the predecessor of defendant in error, the court appointed a guardian *ad litem* for her, who answered in the suit, and that a decree was rendered, her property sold and bid in by the predecessor of the defendant in error. The demurrer of the defendant in error to this paragraph thus construed was sustained by the lower court and its decision affirmed by the Supreme Court. Other paragraphs of the com-

327; *McCracken v. Flanagan*, 127 N. Y. 493, 24 Am. St. Rep. 481. As to the effect of a mistake or omission in the name of the defendant, see *Fanning v. Krapfl*, 68 Ia. 244; *D'Autremont v. Anderson Iron Co.*, 104 Minn. 165, 116 N. W. 357, 17 L. R. A. (N.S.), 236, 124 Am. St. Rep. 615, 15 Ann. Cas. 114; *Proctor v. Nance*, 220 Mo. 104, 119 S. W. 409, 132 Am. St. Rep. 555.

<sup>1</sup> A part of the opinion is omitted. — Ed.

plaint alleged fraud on the part of the predecessor of the defendant in error and her attorneys. The lower court found against this charge, and the Supreme Court, after stating that there was legal evidence to support the finding, refused to disturb it. . . .

The question then is, does the ruling predicated upon the principles thus stated, made in the state court wherein the party has been duly heard, amount to a denial of due process of law within the meaning of the Federal Constitution ? . . .

In the present case the State has made provision for the service of process, and the original party in the foreclosure proceeding did all that the law required in the issue of and attempt to serve process; and, without fraud or collusion, the sheriff made a return to the court that service had been duly made. The duty of making such service and return by the law of the State is delegated to the sheriff, and, although contrary to the fact, in the absence of any attack upon it, the court was justified in acting upon such return as upon a true return. If the return is false the law of the State, as set forth by its Supreme Court, permitted a recovery against the sheriff upon his bond. We are of the opinion that this system of jurisprudence, with its provisions for safeguarding the rights of litigants, is due process of law. It may result, unfortunately, as is said to be the fact in this case, that the recovery upon the sheriff's bond will not be an adequate remedy, but statutes must be framed and laws administered so as to protect as far as may be all litigants and other persons who derive rights from the judgments of courts. So far as this record discloses the purchaser at the sheriff's sale had a right to rely upon the record, which imported verity as to the nature of the service upon the plaintiff in error. If this were not true, as the Supreme Court of Indiana points out, there would be no protection to parties who have relied upon judicial proceedings importing verity, upon the faith of which rights have been adjudicated and value parted with. In a case of this character the law must have in view, not only the rights of the defendant who has been a victim of a false return on the part of the sheriff, but of persons who have relied upon the regularity of the return of officials necessarily trusted by law with the responsibility of advising the court as to the performance of such duties as are here involved. Were the law otherwise titles might be attacked many years after they were acquired, where the party had been guilty of no fraud and had acted upon the faith of judicial proceedings apparently perfect in every respect.

This has been the rule of law applied to a similar situation in the courts of other States. *Gregory v. Ford*, 14 California, 138; *Stites v. Knapp*, Ga. Dec. 36, pt. 2; *Taylor v. Lewis*, 25 Kentucky, 400; *Gardner v. Jenkins*, 14 Maryland, 58; *Smoot v. Judd*, 184 Missouri, 508; *Johnson v. Jones*, 2 Nebraska, 126; *Wardsboro v. Whitingham*, 45 Vermont, 450; *Preston v. Kindrick*, 94 Virginia, 760. And see in this connection *Walker v. Robbins*, 14 How. 584, 585; *Knox County v. Harshman*, 133 U. S. 152, 156.

Without the necessity of deciding more in the present case, it is enough to say that the decision of the Supreme Court of Indiana, made under the circumstances detailed, did not in our opinion deprive the plaintiff in error of due process of law within the meaning of the Fourteenth Amendment.

It follows that the judgment of the Supreme Court of Indiana should be affirmed.

*Judgment affirmed.*<sup>1</sup>

## SHELDON v. COMSTOCK

SUPREME COURT OF RHODE ISLAND. 1854.

[Reported 3 *Rhode Island*, 84.]

THE writ in this action was served by attaching certain articles of personal property. The return of the officer, as originally made, set forth the attachment with the time and place, but did not state that immediately after making the attachment he left an attested copy of the writ with a copy of his doings thereon at the defendant's usual place of abode, with some person there, as is required by sec. 3 of the act entitled "an act prescribing the forms of writs and the manner of serving them."

The defendant filed his motion to dismiss the action for want of service, whereupon the officer also moved the Court for liberty to

<sup>1</sup> There is a considerable diversity of opinion as to how far the sheriff's return is conclusive. See *Carleton v. Bickford*, 13 Gray (Mass.), 591; *Michels v. Stork*, 52 Mich. 260, 17 N. W. 833; *Smoot v. Judd*, 184 Mo. 508, 83 S. W. 481; *Reiger v. Mullins*, 210 Mo. 563, 109 S. W. 26, 124 Am. St. Rep. 755; *Goble v. Brennenman*, 75 Neb. 309, 106 N. W. 440, 121 Am. St. Rep. 813; *Flowers v. King*, 145 N. C. 234, 58 S. E. 1074, 122 Am. St. Rep. 444; *Knutson v. Davies*, 51 Minn. 363, 53 N. W. 646; *Alderson*, Judicial Writs and Process, secs. 193-197; 32 Cyc. 514; 18 Encyc. of Pl. & Pr. 965; 124 Am. St. Rep. 756.

An affidavit of service by a private person is open to attack. *Campbell v. Donovan*, 111 Mich. 247, 69 N. W. 514; *Allen v. McIntyre*, 56 Minn. 351, 57 N. W. 1060; *O'Connor v. Felix*, 147 N. Y. 614, 42 N. E. 269. — ED.



amend his return, by adding to it the following words: "and have left a true and attested copy of this writ, by direction of the defendant, with his, defendant's attorney, Paul Todd, in whose hands defendant stated his affairs to be placed."

The defendant contended that the return, if amended as proposed by the officer, would still be insufficient, and persisted in his motion to dismiss the action.

STAPLES, C. J. Motions by officers for leave to amend their returns on mesne process are of very frequent occurrence. When made at the return term, or during the pendency of the suit, they have generally been granted, and almost as a matter of course. The leave so given is to spread on the record proper evidence of all that the officer actually did on the service of the process committed to him, to correct the omissions and errors in his return.

We are of the opinion that the officer's return, amended according to his motion, would still be insufficient.

An officer's return on process of every kind should state that he has performed what the mandatory part of the process required of him. It should contain a statement of the acts which he has done under and by virtue of it, and the place and the time when and where they were done. His office is simply ministerial. Hence it is insufficient for him to return that he has duly or legally served the process committed to him. He should set forth what he did, and when and where, and leave the question of the legality of his proceedings to some judicial tribunal.

Where the law prescribes any particular forms or proceedings in the service of process, the return of the officer should show that they were specifically complied with. The return should set them forth as fully and circumstantially as though they had been specially required in the mandatory part of the process. All this should be in the return, and as a general thing nothing more. But if more be added, although it may not vitiate the return, it will not be considered as part of it. The facts essential to a return are taken as conclusively proved, if stated in it, except in those cases where express provision to the contrary is made by statute, and except in suits against the officer making it for a false return. The return of the officer is the only proper evidence to prove those facts. If other facts are contained in the return, they are to be rejected. The officer's return is no proper evidence of their truth.

In the present case the law required the officer making the attachment, immediately after making it, "to leave an attested

copy of the writ, with a copy of his doings thereon, at the defendant's usual place of abode, with some person there." The return as originally made, contains no averment of this fact and as proposed to be amended, it is equally faulty. No copy was left where the law required one should be left. The return, as amended, will state that the officer did leave a copy "by directions of the defendant with the defendant's attorney, Paul Todd, in whose hands defendant stated his affairs to be placed." No law required the officer to do this. It was no part of his duty. The facts set forth form no essential part of his return. They are not therefore proved by the return. The facts therefore do not exist — but if they existed would not constitute a sufficient return to the writ.

The plaintiff's counsel contended that the statute afore referred to gives a reason for the leaving of a copy, to wit: "that the defendant may have knowledge of the suit," and that it appears by the return that the defendant did have actual knowledge of the suit, and did direct where the copy should be left, and that it was left there.

Two sufficient answers to this suggestion appear in the general principles hereinbefore recited. First — the officer's return is no evidence of these facts, they not being necessary parts of a sufficient return to his writ. And second — if taken to be true, they are not the formalities required by law, nor even a substantial compliance with the law. Courts are required to infer a knowledge of the suit in the defendant when the requisites of the law are complied with. If they should infer it from the statements of the officer in his return, which are not required of him, but which would seem to imply more certain knowledge than the bare leaving a copy at the defendant's usual place of abode, ought not a similar inference to be drawn from the same facts proved by other witnesses, or from other facts some way established, involving a little less certainty? If so, how much less? The only safe construction is a substantial compliance with the statute requisitions, established by the proper evidence.<sup>1</sup>

<sup>1</sup> As to amendments of the sheriff's return, see *Palmer v. Thayer*, 28 Conn. 237; *Jones v. Bibb Brick Co.*, 120 Ga. 321, 48 S. E. 25; *O'Conner v. Wilson*, 57 Ill. 226; *Bryant v. Knapp*, 103 Me. 139, 68 Atl. 640; *Main v. Lynch*, 54 Md. 658; *Emerson v. Upton*, 9 Pick. (Mass.), 167; *Kahn v. Mercantile, etc., Ins. Co.*, 228 Mo. 585, 128 S. W. 995, 137 Am. St. Rep. 665; *Stealman v. Greenwood*, 113 N. C. 355, 18 S. E. 503; *Alderson, Judicial Writs and Process*, sec. 192; 32 Cyc. 537; 18 Encyc. of Pl. & Pr. 950.

Affidavits of service may be amended. *Woodward v. Brown*, 119 Cal. 283, 51 Pac. 2.

For forms of returns of personal service of process on a single individual defendant, see Section 1 of this Chapter.

The following is a form of affidavit of personal service of summons by a private person on a single individual defendant:

[Title]

County of —, ss.

X, being duly sworn, says that he is — the age of — years, and that on the — day of —, 19—, at —, he served the annexed [or within] summons and [here insert names of papers served with summons, if any], on — defendant in this action, by delivering a copy of the same to such defendant personally and leaving the same with him. He further says, that he knew the person served as aforesaid to be the person mentioned and described in the said summons as the defendant in this action.

Sworn to before, me, this — day of —, 19—.

See *French v. Ajax Oil, etc., Co.*, 44 Wash. 305, 87 Pac. 359. — Ed.

## CHAPTER III.

### APPEARANCE.

#### ST. LOUIS CAR COMPANY *v.* STILLWATER STREET RAILWAY COMPANY.

SUPREME COURT OF MINNESOTA. 1893.

[Reported 53 *Minnesota*, 129.]

MITCHELL, J.<sup>1</sup> This action was brought by the plaintiff, as judgment creditor, for the appointment of a receiver of the defendant corporation, under the provisions of 1878 G. S. ch. 76.

A receiver had previously been appointed in a foreclosure suit brought by one Curtis against the same defendant.

The plaintiff having made a motion in the present action, the defendant appeared by attorney, the appearance being stated to be special, and objected to "any further proceedings, or any proceedings, in the action looking towards the appointment of a receiver thereof," upon the grounds — *First*, that "there is a receiver already appointed therein, under and by virtue of an order of this court in an action already pending therein"; *second*, because the *plaintiff* has never acquired "jurisdiction in this action of either subject-matter or of the person of the defendant corporation."

Giving counsel the benefit of the assumption that by "plaintiff" is meant "court," we still think that this amounted to a general appearance, which gave the court jurisdiction of the defendant. The rule is that an appearance for any other purpose than to question the jurisdiction of the court is general.

The first ground of objection to plaintiff's application for the appointment of a receiver did not go to the jurisdiction of the court, either over the subject-matter or over the person of the defendant, and did not purport to be made as such, but merely as a defense on the merits to plaintiff's motion, to wit, that a receiver had been already appointed in another action. . . .

Order reversed, and cause remanded for further proceedings.<sup>2</sup>

VANDEBURGH, J., absent, took no part.

<sup>1</sup> The statement of facts is omitted, together with a part of the opinion in which it was held that the fact that a receiver had already been appointed in the foreclosure suit constituted no reason why a receiver should not be appointed in the present suit. — Ed.

<sup>2</sup> As to what constitutes a general appearance, see *Boyle v. Sacker*, 39



IN *DAVIS v. CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY*, 217 United States 157, 174, the court (McKENNA, J.) said:—

The next contention of plaintiff is that the appearance of the C. C. C. & St. L. Ry. Co. was a general appearance and submitted its person to the jurisdiction of the court. In other words, it is contended that the person over whom personal jurisdiction has not been obtained cannot appear specially to set aside the attachment of his property, which we must assume in order to completely exhibit the contention, is valid. We cannot concur in the contention. It is supported, it is true, by some cases, but it is opposed by more. *Drake on Attachments*, §112, and cases cited. The stronger reasoning we think too is against the contention. A court without personal service can acquire no jurisdiction over the person, and when it attempts to assert jurisdiction over property it should be open to the defendant to specially appear to contest its control over such property; in other words to contest the ground of its jurisdiction. *Harkness v. Hyde*, 98 U. S. 476; *Railway Co. v. Denton*, 146 U. S. 206; *Goldey v. Morning News*, 156 U. S. 518, 523; *Railway Co. v. Brow*, 164 U. S. 271, 278.

The appearance of the C. C. C. & St. L. Ry. Co. was not to object to the subject-matter of the action, as it is contended by plaintiff. The subject-matter of the action is a demand for damages, which can only be prosecuted to efficient judgment and be satisfied out of the property attached. *Clark v. Wells*, 203 U. S. 164. The jurisdiction of the court, therefore, depended upon the attachment, and the appearance to set that aside was an appearance to object to the jurisdiction. In other words, the defendant was only in court through its property, and it appeared specially to show that it was improperly in court.

Ch. Div. 249; *Wabash Western Railway v. Brow*, 164 U. S. 271, 41 L. ed. 431, 17 S. Ct. 126; *Western Loan Co. v. Butte & Boston Mining Co.*, 210 U. S. 368, 52 L. ed. 1101, 28 S. Ct. 720; *Wood v. Wilbert*, 226 U. S. 384, 57 L. ed. 264, 33 S. Ct. 125; *Bankers Life Ins. Co. v. Robbins*, 59 Neb. 170, 80 N. W. 484; *Templin v. Kinsey*, 74 Neb. 614, 105 N. W. 89; *Dickinson v. Farwell*, 71 N. H. 213, 51 Atl. 624; *Reed v. Chilson*, 142 N. Y. 152, 36 N. E. 884; *Merke v. City of Rochester*, 13 Hun (N.Y.), 157; *Alderson v. White*, 32 Wis. 308; *Boston v. Inter-County Fair*, 135 Wis. 339, 115 N. W. 809. See also 3 Cyc. 503; 2 Encyc. of Pl. & Pr. 632.

Jurisdiction may be conferred by a voluntary appearance although both parties are non-residents. *Fairfax, etc., Co. v. Chambers*, 75 Md. 604, 23 Atl. 1024; *Cofrode v. Circuit Judge*, 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 511. — Ed.

CORBETT v. PHYSICIANS' CASUALTY ASSOCIATION  
OF AMERICA.

SUPREME COURT OF WISCONSIN. 1908.

[Reported 135 *Wisconsin*, 505.]

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Affirmed*.

Action to recover on an accident insurance policy issued on the mutual assessment plan.

The contract secured to plaintiff, as beneficiary, the sum of \$3,000 in case of the death by accidental means of George W. Corbett, her husband. The complaint contained all allegations essential to a recovery. The answer stated three defenses, as follows, in effect: (1) The defendant is a Nebraska corporation which has never complied with the laws of this state authorizing service of process upon it by serving upon the commissioner of insurance and the only service made was of that character; (2) without waiving the plea to the jurisdiction of the court the defendant shows that it never qualified to do business in this state and, therefore, the making of the insurance contract was prohibited by sec. 1978, Stats. (1898), and is not enforceable in the courts of this state; (3) without waiving any right under the foregoing the allegations of the complaint as to the assured being a member in good standing of the association at the time he was injured are denied, and it is alleged that he was not such member by reason of his having failed to pay the last assessment upon his policy, which was due five days before his death, prior to the date of his injury. . . .

The plea to the jurisdiction was tried first and overruled. Defendant by its counsel excepted to the ruling. No specific objection was made to then proceeding to a trial upon the merits, which was done. Before the hearing commenced there was a stipulation that the jurisdictional matter should first be disposed of, and then, if the decision should be adverse to the defendant, the trial should proceed on the merits. . . .

Judgment was rendered in favor of plaintiff, from which this appeal was taken. . . .

MARSHALL, J.<sup>1</sup> At the threshold in the consideration of this case is presented the question of whether a defendant can challenge the jurisdiction of the court in which he is cited to appear, upon

<sup>1</sup> A part of the statement of facts and a part of the opinion are omitted.—  
ED.

the ground that the summons in the action was not efficiently served, and failing in that can submit to a trial upon the merits and in case of an adverse decision can, on appeal, have the benefit of the objection made at the start. Counsel for appellant refer to our statute and that of the state of Nebraska and decisions in respect to the latter and draw the conclusion therefrom that such a course is proper.

As we view the case we need not follow and endeavor to answer counsel's argument in detail on the jurisdictional question, because it is firmly settled in respondent's favor by numerous decisions of this court. *Lowe v. Stringham*, 14 Wis. 222; *Grantier v. Rosecrance*, 27 Wis. 488; *Blackwood v. Jones*, 27 Wis. 498; *Anderson v. Coburn*, 27 Wis. 558; *Ins. Co. of N. A. v. Swineford*, 28 Wis. 257; *Alderson v. White*, 32 Wis. 308; *Dikeman v. Struck*, 76 Wis. 332, 45 N. W. 118. The following language by Dixon, C. J., in *Alderson v. White*, *supra*, referred to by counsel for respondent, is often quoted as an unmistakable indication of the doctrine prevailing in this state:

"The party seeking to take advantage of want of jurisdiction in every such case, must object on that ground alone, and keep out of court for every other purpose. If he goes in for any purpose incompatible with the supposition that the court has no power or jurisdiction on account of defective service of process upon him, he goes in and submits for all the purposes of personal jurisdiction with respect to himself, and cannot afterwards be heard to make the objection. It is a general appearance on his part, equivalent in its effect to proof of due personal service of process."

It will be thus seen that the right to proceed to a trial on the merits after a decision against the defendant on the jurisdictional question, efficiently saving an objection to the ruling in that regard, is not recognized as having any place in our practice. The quoted language was only a reiteration, in effect, of what was said in *Lowe v. Stringham*, *supra*. There the doctrine which has from the start prevailed here, was thus plainly stated in these words:

"We think it is also a waiver of such a defect for the party, after making his objection, to plead and go to trial on the merits. To allow him to do this, would be to give him this advantage. After objecting that he was not properly in court, he could go in, take his chance of a trial on the merits, and if it resulted in his favor, insist upon the judgment as good for his benefit, but if it resulted against him, he could set it all aside upon the ground that he had never been properly got into court at all. If a party wishes to insist upon the objection that he is not in court, he must keep out for all purposes except to make that objection."

We recognize that there are very respectable authorities to the contrary of the foregoing, among which are the following: *Harkness v. Hyde*, 98 U. S. 476; *Miner v. Francis*, 3 N. Dak. 549, 58 N. W. 343, 2 Ency. Pl. & Pr. 629, 630, and note 1. However, it is believed that the great weight of authority, or at least the better reasoning, is the other way. These are but a few of the many cases that might be cited in support of that: *In re Clarke*, 125 Cal. 388, 392, 58 Pac. 22; *Manhard v. Schott*, 37 Mich. 234; *Stevens v. Harris*, 99 Mich. 230, 58 N. W. 230; *Union Pac. R. Co. v. De Busk*, 12 Colo. 294, 20 Pac. 752; *Lord v. Hendrie & B. Mfg. Co.*, 13 Colo. 393, 22 Pac. 782; *Ruby Chief M. & M. Co. v. Gurley*, 17 Colo. 199, 29 Pac. 668; *Stephens v. Bradley*, 24 Fla. 201, 3 South. 415; *Thayer v. Dove*, 8 Blackf. 567; *Kronski v. Mo. Pac. R. Co.*, 77 Mo. 362. . . .

By the Court. — The judgment is affirmed. A motion for a rehearing was denied May 8, 1908.<sup>1</sup>

<sup>1</sup> For conflicting decisions on the question involved in the principal case see 3 Cyc. 525; 2 Encyc. of Pl. & Pr. 629; 16 L. R. A. (N. S.), 177.

In *Harkness v. Hyde*, 98 U. S. 476, 25 L. ed. 237, the court said (p. 479): "The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground, or what we consider as intended, that the service be set aside; nor, when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when being urged it is overruled, and the defendant is thereby compelled to answer. He is not to be considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived."

If the defendant is arrested and he enters a special appearance and unsuccessfully denies the jurisdiction of the court over his person, and afterwards pleads to the merits, he does not thereby waive the question of jurisdiction. *Warren v. Crane*, 50 Mich. 300, 15 N. W. 465.

If the defendant enters a special appearance and unsuccessfully denies the jurisdiction of the court over his person, and afterwards files a cross-complaint demanding affirmative relief, he thereby waives the question of jurisdiction. *Chandler v. Citizens National Bank*, 149 Ind. 601, 49 N. E. 579; *Linton v. Heye*, 69 Neb. 450, 95 N. W. 1040, 111 Am. St. Rep. 556; *Austin Manufacturing Co. v. Hunter*, 16 Okl. 86, 86 Pac. 293. — Ed.



GODFREY *v.* VALENTINE.

SUPREME COURT OF MINNESOTA. 1888.

[Reported 39 *Minnesota*, 336.]

APPEAL by defendant from an order of the district court for Ramsey county, BRILL, J., presiding, denying his motion to set aside a judgment, (among other grounds for want of jurisdiction), and for leave to answer.

DICKINSON, J. This is an appeal by the defendant from an order denying a motion to set aside a judgment entered against him in the district court, in August, 1883, the defendant never having appeared in the action. The motion raised the question of the jurisdiction of the court. After proper proof of the non-residence of the defendant, and of want of knowledge as to his place of residence, the summons was published in the St. Paul Daily Globe, and, upon proof by affidavit of such publication, and of the defendant's default, the cause was brought to hearing and judgment. The asserted jurisdictional defect is that the summons was not published "once in each week" for six consecutive weeks, as prescribed by the statute. The affidavit of publication, embraced in the judgment-roll, states that the summons was published in the St. Paul Daily Globe "for the period of six successive weeks, commencing on the 23d day of June, 1883, on which day last mentioned it was first published, and ending on the 4th day of August, 1883, on which day last mentioned it was last published. . . ." This affidavit is referred to in the judgment itself as the proof of service upon which the court entertained jurisdiction. The statute provides that proof of service by publication shall be made by affidavit, (Gen. St. 1878, c. 66, § 68), and (in case the judgment is upon default to answer) that proof of the service of the summons be incorporated in the judgment-roll. *Id.* § 275. It will not be presumed that there was other proof of service than that thus shown in the record, nor, in an action against a non-resident who is shown to have been personally beyond the jurisdiction of the court, will it be presumed, the question being directly presented, that the court acquired jurisdiction by substituted service, unless that is affirmatively shown. *Barber v. Morris*, 37 Minn. 194, (33 N. W. Rep. 559); *Brown v. St. Paul & N. P. Ry. Co.*, 38 Minn. 506, (38 N. W. Rep. 698); *Morey v. Morey*, 27 Minn. 265, (6 N. W. Rep. 783); *Galpin v. Page*, 18 Wall. 350.

Following the decisions in *Ullman v. Lion*, 8 Minn. 338, (381), and *Golcher v. Brishin*, 20 Minn. 407, (453), we must hold this affidavit

of publication insufficient to show a publication "once in each week" for the prescribed period. This conclusion is also sustained by *Hernandez v. Creditors*, 57 Cal. 333.

The respondent relies in support of the judgment upon the rule declared in *Curtis v. Jackson*, 23 Minn. 268, to the effect that the appearance by a party, unless limited to mere jurisdictional questions, cures a want of jurisdiction as to a judgment previously rendered. The propriety of that rule with respect to an appearance after judgment, and for the purpose of securing relief from the judgment, was doubted in *Kanne v. Minn. & St. Louis Ry. Co.*, 33 Minn. 419, 421, (23 N. W. Rep. 854). The doctrine of *Curtis v. Jackson*, to the full extent expressed in that decision, cannot, we are satisfied, be sustained upon principle. Upon an application to set aside a judgment shown to have been absolutely void because the court had acquired no jurisdiction in the cause, an objection distinctly made upon that ground should not be deemed to have been at the same time waived from the fact that the moving party also urges in support of his application additional reasons not inconsistent with the alleged want of jurisdiction, nor because, by asking to be allowed to file an answer as in a pending cause, he indicates his present willingness to submit himself to the jurisdiction of the court, in order that, after a hearing upon the issues thus presented, the court may proceed to judgment. The course of the moving party in thus seeking to have a void judgment set aside, — to which relief he is entitled as a matter of right, — but at the same time consenting and asking that the court shall now hear and adjudicate upon the cause, may justify the court in entertaining the cause and proceeding as in an action pending in which the defendant has voluntarily appeared. But in thus urging his legal right, and thus invoking and consenting to the future action of the court, the moving party should not be deemed to have conferred jurisdiction retrospectively, so as to render valid the previous judgment, which, being unsupported by any authorized judicial proceedings, was not merely voidable, but void, and in legal effect a nullity. *Gray v. Hawes*, 8 Cal. 562; *Shaw v. Rowland*, 32 Kan. 154, (4 Pac. Rep. 146); *Boals v. Shules*, 29 Iowa, 507; *Briggs v. Sneghan*, 45 Ind. 14; *State v. Cohen*, 13 S. C. 198; *Moore v. Watkins*, 1 Ark. 268.

*Order reversed.*<sup>1</sup>

<sup>1</sup> See *Simensen v. Simensen*, 13 N. D. 305, 100 N. W. 708. But see *Marsden v. Soper*, 11 Oh. St. 503; *Henry v. Henry*, 15 S. D. 80, 87 N. W. 522.

Intervening rights of third persons at any rate will not be cut off. *Anderson v. Coburn*, 27 Wis. 558. — Ed.

YORK *v.* TEXAS.

SUPREME COURT OF THE UNITED STATES. 1890.

[Reported 137 *United States*, 15.]

ON the 14th day of November, 1888, a personal judgment was rendered in the District Court of Travis County, Texas, against the plaintiff in error, which judgment was subsequently affirmed by the Supreme Court of the State. Error is now alleged in this, that the District Court had no jurisdiction of the person of the defendant. The record discloses that on October 20, 1885, the defendant leased from the State certain school lands, at a stipulated rental. The lease provided that in all suits thereunder the venue should be laid in Travis County, Texas. The State filed its petition on February 15, 1888, alleging non-payment of the rent due in 1886 and 1887. The defendant being a non-resident, a citizen of St. Louis, Missouri, a notice in accordance with the provisions of the statute was served upon him personally in that city. No question is made but that the service was in strict conformity with the letter of the statute. On March 9, 1888, the defendant appeared by his counsel and filed a special plea, challenging the jurisdiction of the court, on the ground that he was a non-resident and had not been served personally with process within the limits of the State. This plea was overruled. Thereafter, and on the 5th day of October, 1888, the defendant appeared by his attorneys in open court, demanded a jury, paid the jury fee, and had the cause transferred to the jury docket. On the 6th day of October he again filed a plea to the jurisdiction, on the same ground, which was also overruled. On the 14th day of November, when the cause was reached and called for trial, he again appeared by his attorneys, waived his right of trial by a jury and his demand of a jury, and declined to further answer to the cause — relying solely upon his plea to the jurisdiction. The court thereupon proceeded to render judgment against him, which, as heretofore stated, was affirmed by the Supreme Court. 73 Texas, 651.

BREWER, J. It was conceded by the District and the Supreme Courts that the service upon the defendant in St. Louis was a nullity, and gave the District Court no jurisdiction; but it was held that, under the peculiar statutes of the State of Texas, the appearance for the purpose of pleading to the jurisdiction was a voluntary appearance, which brought the defendant into court. Plaintiff in error questions this construction of the Texas statutes; but, inas-

much as the Supreme Court, the highest court of the State, has so construed them, such construction must be accepted here as correct, and the only question we can consider is, as to the power of the State in respect thereto.

It must be conceded that such statutes contravene the established rule elsewhere — a rule which also obtained in Texas at an earlier day, to wit, that an appearance which, as expressed, is solely to challenge the jurisdiction, is not a general appearance in the cause, and does not waive the illegality of the service or submit the party to the jurisdiction of the court. *Harkness v. Hyde*, 98 U. S. 476; *Raquet v. Nixon*, Dallam (Texas), 386; *De Witt v. Monroe*, 20 Texas, 289; *Hagood v. Dial*, 43 Texas, 625; *Robinson v. Schmidt*, 48 Texas, 19.

The difference between the present rule in Texas and elsewhere is simply this: Elsewhere the defendant may obtain the judgment of the court upon the sufficiency of the service, without submitting himself to its jurisdiction. In Texas, by its statute, if he asks the court to determine any question, even that of service, he submits himself wholly to its jurisdiction. Elsewhere, he gets an opinion of the court before deciding on his own action. In Texas, he takes all the risk himself. If the service be in fact insufficient, all subsequent proceedings, including the formal entry of judgment, are void; if sufficient, they are valid. And the question is, whether under the Constitution of the United States the defendant has an inviolable right to have this question of the sufficiency of the service decided in the first instance and alone.

The Fourteenth Amendment is relied upon as invalidating such legislation. That forbids a State to "deprive any person of life, liberty or property, without due process of law." And the proposition is, that the denial of a right to be heard before judgment simply as to the sufficiency of the service operates to deprive the defendant of liberty or property. But the mere entry of a judgment for money, which is void for want of proper service, touches neither. It is only when process is issued thereon or the judgment is sought to be enforced that liberty or property is in present danger. If at that time of immediate attack protection is afforded, the substantial guarantee of the amendment is preserved, and there is no just cause of complaint. The State has full power over remedies and procedure in its own courts, and can make any order it pleases in respect thereto, provided that substance of right is secured without unreasonable burden to parties and litigants. *Antoni v. Greenhow*, 107 U. S. 769. It certainly is more conven-



ient that a defendant be permitted to object to the service, and raise the question of jurisdiction, in the first instance, in the court in which suit is pending. But mere convenience is not substance of right. If the defendant had taken no notice of this suit, and judgment had been formally entered upon such insufficient service, and under process thereon his property, real or personal, had been seized or threatened with seizure, he could by original action have enjoined the process and protected the possession of his property. If the judgment had been pleaded as defensive to any action brought by him, he would have been free to deny its validity. There is nothing in the opinion of the Supreme Court or in any of the statutes of the State, of which we have been advised, gainsaying this right. Can it be held, therefore, that legislation simply forbidding the defendant to come into court and challenge the validity of service upon him in a personal action, without surrendering himself to the jurisdiction of the court, but which does not attempt to restrain him from fully protecting his person, his property and his rights against any attempt to enforce a judgment rendered without due service of process, and therefore void, deprives him of liberty or property, within the prohibition of the Fourteenth Amendment? We think not.

*The judgment is affirmed.*<sup>1</sup>

MR. JUSTICE BRADLEY and MR. JUSTICE GRAY dissented.

### CREIGHTON *v.* KERR *et al.*

SUPREME COURT OF COLORADO TERRITORY. 1872.

[Reported 1 *Colorado*, 509.]

Suit commenced by attachment to the June term, 1870; amount specified in the affidavit \$5,563.50. Cause of action in the affidavit, for telegraph poles and labor and material furnished by the plaintiffs to defendant. The declaration contained the common counts for work and labor, for telegraph poles, goods, wares and merchandise, for money paid, laid out and expended, and a count upon an account stated; the damages were laid at \$8,000.

<sup>1</sup> The statute which was upheld in the principal case does not apply to actions brought in the federal courts in Texas. *Southern Pacific Company v. Denton*, 146 U.S. 202, 36 L. ed. 942, 13 S. Ct. 44. Compare *Louden Machinery Co. v. American Malleable Iron Co.*, 127 Fed. 1008. — Ed.

At the October term, 1870, the defendant appeared by Charles & Elbert, his attorneys, and submitted to a rule to plead within ten days. Afterward, and before the expiration of the ten days, an order was entered of record in the cause, as follows:

“Now on this day came Messrs. Charles & Elbert, and withdrew their appearance as attorneys for the said defendant, without prejudice to the plaintiffs.”

Afterward, and at the same term, the plaintiffs obtained judgment against the defendant for \$8,000 and costs.

WELLS, J. It appears to us that the withdrawal of the appearance which was entered on the part of the plaintiff in error in the court below, whether it be regarded as the act of the attorneys merely or as the act of the defendant himself, left the plaintiffs below in precisely the same position as if it had not been withdrawn or in any manner qualified. If we are to give any effect to the words of the record of this proceeding, they impart a stipulation by the defendant, or at least a condition imposed by the court, that the plaintiffs shall not lose any advantage which, by reason of the appearance, they had gained. The appearance, to all intents and purposes, still stood as a waiver of process, and sufficiently supported the judgment *nil dicit*, which was afterward given.

And this, we think, also disposes of the second question which is presented by counsel, for, if we consider the appearance which was interposed on behalf of the defendant, as still so far subsisting as to waive the necessity of process; if the plaintiffs, notwithstanding the withdrawal of the defendant's attorneys, still maintained their advantage in this respect, it follows that there was still an appearance subsisting on behalf of defendant for all purposes where such appearance could afford the plaintiff any advantage.

Therefore, the attachment which, in the first instance, was but a proceeding *in rem*, and which, by the defendant's appearance, had assumed the character of an action *in personam*, still remained of the same character after the appearance was withdrawn, and the plaintiffs were still entitled to have judgment for whatever damages they might establish under their declaration within the limit of the *ad damnum* laid therein, whether the causes of action counted upon were the same as those mentioned in the affidavit or different. The position of the plaintiffs was the same as if the defendant had plead to the action and the issue had been tried by a jury; and, in such cases, it has uniformly, we believe, been held

that the plaintiff's recovery is not limited to the amount or causes of action specified in the affidavit.

We see no error in the record. The judgment of the court below is, therefore, affirmed. *Affirmed.*<sup>1</sup>

McMINN *v.* HAMILTON, Administrator.

SUPREME COURT OF NORTH CAROLINA. 1877.

[Reported 77 *North Carolina*, 300.]

APPEAL from an Order dismissing the Action, made at Spring Term, 1877, of Transylvania Superior Court, by HENRY, J.

From the case agreed and the record, the following facts appear: The plaintiff brought an action against the defendant in his representative character for \$70.35 before a Justice of the Peace in said County where both parties reside. The defendant obtained letters of administration and filed his official bond in Henderson County. The defendant appeared before the Justice and pleaded payment and statute of limitations. Evidence was heard and judgment was rendered for the plaintiff, from which the defendant appealed. In the Superior Court he filed a demurrer, not to the jurisdiction, but on other grounds; and made a motion at the same term to dismiss the action for want of jurisdiction. The plaintiff declined to remove the case by consent and His Honor dismissed the action. From which order the plaintiff appealed.

FAIRCLOTH, J. (After stating the facts as above.) Where a Court has no jurisdiction of the subject matter, the objection can be taken at any time, and indeed as soon as this fact is discovered the Court *mero motu* will take notice of it and dismiss the action. But if it has jurisdiction of the subject matter and the venue is wrong, the objection must be taken in apt time; and if the defendant pleads to the merits of the action, he will be taken to have waived the objection. He cannot have two chances.

Applying this principle to the case before us, we think the defendant waived the objection by pleading before the Justice and that it was then too late to raise it.

Error.

PER CURIAM.

*Judgment reversed.*<sup>2</sup>

<sup>1</sup> See *The Duplex*, [1912] P. 8; *Fitzgerald Const. Co. v. Fitzgerald*, 137 U. S. 98, 34 L. ed. 608, 11 S. Ct. 36; *Oliver v. Kinney*, 173 Ala. 593, 56 So. 203; *Conn v. Caldwell*, 6 Ill. 531. — Ed.

<sup>2</sup> In the following cases, the objection that the action was brought in the

# INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY v. GIBNEY.

SUPREME COURT OF THE UNITED STATES. 1895.

[Reported 160 *United States*, 217.]

THIS was an action at law, brought June 9, 1890, in the Circuit Court of the United States for the District of Indiana, by the Interior Construction and Improvement Company against John C. Gibney and Harvey Bartley, copartners under the name of J. C. Gibney and Company, and James B. McElwaine and James B. Wheeler, upon a bond, by which "J. C. Gibney & Co., as principals, and J. B. McElwaine and J. B. Wheeler, as sureties, are holden and firmly bound," jointly and severally, to the plaintiff, in the sum of \$20,000, for the performance of a contract made by "said J. C. Gibney & Co." with the plaintiff.

The complaint alleged that the plaintiff was incorporated under the laws of the State of New Jersey, and was a citizen thereof; and that all the defendants were citizens and residents of the State of Indiana.

On June 19, 1890, the defendants Gibney, McElwaine and Wheeler, by their attorney, entered a general appearance. But Gibney never pleaded or answered; and the defendant Bartley never appeared, or made any defence.

On September 19, 1891, McElwaine and Wheeler pleaded in abatement that at the time of the bringing of this action, and ever since, Gibney and Bartley were citizens of the State of Pennsylvania, and not citizens or residents of the State of Indiana; and that, therefore, the court had no jurisdiction of the case.

The plaintiff demurred to this plea, as not containing facts sufficient to constitute a cause for the abatement of the action. The plaintiff declining to plead further, but electing to stand upon its

wrong county or district was held to be waived: *Woolf v. McGaugh*, 175 Ala. 299, 57 So. 754; *Eel River R. R. Co. v. State*, 143 Ind. 231, 42 N. E. 617; *Gillen v. Ill. Cent. Ry. Co.*, 137 Ky. 375, 125 S. W. 1047; *Webb v. Goddard*, 46 Me. 505; *Murphy v. Merrill*, 12 Cush. (Mass.) 284; *Putnam v. Bond*, 102 Mass. 370; *Norberg v. Heineman*, 59 Mich. 210, 26 N. W. 481; *Bishop v. Silver Lake Mining Co.*, 62 N. H. 455; *Blackford v. Lehigh Valley Ry. Co.*, 53 N. J. L. 56, 20 Atl. 735; *Bunker v. Langs*, 76 Hun (N. Y.), 543, 28 N. Y. Supp. 210; *Sentenis v. Ladew*, 140 N. Y. 463, 35 N. E. 650, 37 Am. St. Rep. 569; *Fennell v. Guffey*, 155 Pa. 38, 25 Atl. 785; *De la Vega v. League*, 64 Tex. 205.

— ED.



demurrer to the plea, the court adjudged that the plaintiff take nothing by its action, and that the defendant recover costs.

The plaintiff thereupon presented a petition for the allowance of a writ of error "for the review of the judgment heretofore rendered therein in favor of the defendants and against the plaintiff, therein holding and deciding that this court has no jurisdiction of said action;" and assigned, as errors, that the Circuit Court erred, 1st, in overruling the plaintiff's demurrer to the plea in abatement; 2d, in sustaining the plea in abatement, and holding that the court had no jurisdiction of the cause; 3d, in entering judgment in favor of the defendants and against the plaintiff on the plea in abatement, and dismissing and quashing the proceedings. The writ of error was thereupon allowed by the judge presiding in the Circuit Court.

GRAY, J.<sup>1</sup> . . . The act of March 3, 1887, c. 373, as corrected by the act of August 13, 1888, c. 866, confers upon the Circuit Courts of the United States original jurisdiction of all civil actions, at common law or in equity, between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2000; and provides that "where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 24 Stat. 552; 25 Stat. 433.

The Circuit Courts of the United States are thus vested with general jurisdiction of civil actions, involving the requisite pecuniary value, between citizens of different States. Diversity of citizenship is a condition of jurisdiction, and, when that does not appear upon the record, the court, of its own motion, will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties; but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon, or may waive, at his election; and the defendant's right to object that an action, within the general jurisdiction of the court, is brought in the wrong district, is waived by entering a general appearance, without taking the objection. *Gracie v. Palmer*, 8 Wheat. 699; *Toland v. Sprague*, 12 Pet. 300, 330; *Ex parte Schollenberger*, 96 U. S. 369, 378; *St. Louis & San Francisco Railway v. McBride*, 141 U. S. 127; *South-*

<sup>1</sup> A part of the opinion is omitted. — Ed.

ern Pacific Co. *v.* Denton, 146 U. S. 202, 206; Texas & Pacific Railway *v.* Saunders, 151 U. S. 105; Central Trust Co. *v.* McGeorge, 151 U. S. 129; Southern Express Co. *v.* Todd, 12 U. S. App. 351. . . .

*Judgment reversed, and case remanded with directions to sustain the demurrer to the plea, and for further proceedings not inconsistent with this opinion.*<sup>1</sup>

WHELOCK, Assignee, *etc.* *v.* LEE.

COURT OF APPEALS OF NEW YORK. 1878.

[Reported 74 *New York*, 495.]

RAPALLO, J.<sup>2</sup> The defendant set up in his answer that the plaintiff's cause of action, if any, did not arise in the city of Brooklyn but in the city of New York. That at the time of the commencement of this action the defendant did not reside in the city of Brooklyn, that he never resided or had a place of business there, and that the summons was served in the city of New York and not in the city of Brooklyn and that consequently the City Court of Brooklyn had no jurisdiction of the person of the defendant or of the action. These allegations are substantiated by the evidence and findings, and it is conceded that they establish a want of jurisdiction in the city court and a fatal objection to the judgment, unless such objection has been waived or cured.

This question was not passed upon nor did it arise when this case was before us on the first appeal. The facts upon which the objection is based were not in the case, the court below having excluded proof of them. A new trial was ordered on other exceptions. The defendant, by putting in a general appearance, followed by an answer setting up the want of jurisdiction, did not waive that defense. This was expressly decided in the case of *Landers v. Staten Island Railroad Co.*, 53 N. Y. 450, 460. The prevailing opinion in that case sets forth fully the grounds upon which it was held that the city court was without jurisdiction. They are in substance that the city court was a local court of limited jurisdiction at the time of the adoption of the judiciary article of the State Constitution in 1869 and that it was continued

<sup>1</sup> See *In re Moore*, 209 U. S. 490, 52 L. ed. 904, 28 S. Ct. 706, 14 Ann. Cas. 1164; *Ingersoll v. Coram*, 211 U. S. 335, 53 L. ed. 208, 29 S. Ct. 92. — Ed.

<sup>2</sup> The statement of facts and a part of the opinion are omitted. — Ed.

as such and it was even beyond the power of the Legislature to divest it of its local character. That its jurisdiction was limited to cases in which the cause of action arose within its territorial limits, and cases in which the subject of the action was situated, or the party proceeded against resided, or was served with process, within those limits. That some one or more of these elements of locality must exist to confer upon the court jurisdiction of the cause. It follows that where none of them exists, a mere appearance does not preclude the defendant from taking the objection. Where no other ground of jurisdiction exists, the service within the county is a jurisdictional fact. Its omission is not cured by an appearance, for the objection is not simply that the court has not jurisdiction of the person of the defendant, but that it has not jurisdiction of the cause. *Burekle v. Eckhart*, 3 Comst. 132. In a case in which the court had jurisdiction of the cause on some of the other grounds, as, for instance, where the cause of action arose within the city of Brooklyn, the general rule would apply, that a general appearance cures any defect in the service of process to bring the defendant into court, and even the total absence of any service. But where, as in this case, the only element of locality which can exist, and the only means by which the cause can be brought within the jurisdiction of the court as a local court, is the service of the summons within a certain territory, that rule is not applicable. But the point having been expressly adjudged it is not necessary to pursue it farther. . . .

All concur, except MILLER and EARL, JJ., absent.

*Judgment reversed.*<sup>1</sup>

# BAYLEY and Another v. BUCKLAND and Others.

COURT OF EXCHEQUER. 1847.

[Reported 1 *Exchequer*, 1.]

ROLFE, B.<sup>2</sup> We took time to consider this case, in order that we might determine what rule it might be proper to lay down as a

<sup>1</sup> As to the effect of a general appearance upon jurisdiction of the subject of the action, see *Davis v. Packard*, 7 Pet. (U. S.), 276; *Continental Ins. Co. v. Rhoads*, 119 U. S. 237, 30 L. ed. 380, 7 S. Ct. 193; *German Sav. & L. Soc. v. Dereintzer*, 192 U. S. 125, 48 L. ed. 221, 24 S. Ct. 221; *Murphy v. People*, 221 Ill. 127, 77 N. E. 439; *Dudley v. Mayhew*, 3 N. Y. 9; *Davidsburgh v. Knickerbocker Life Ins. Co.*, 90 N. Y. 526; *Chambers v. Feron and Ballou Co.*, 56 N. Y. Supp. 338; *Holton v. Holton*, 64 Or. 290, 129 Pac. 532, 48 L. R. A. (N. B.), 779 — Ed.

<sup>2</sup> The statement of fact is omitted. — Ed.

guide to similar cases in future. There is no dispute as to the facts. The plaintiffs commenced their action against the several defendants, including Mr. George Gordon, the party now applying for relief; they served some of the defendants, not including the applicant Mr. Gordon, with the writ, and after this an attorney at Neath, Mr. George Leeds, was instructed by the parties served to appear, and did appear for all the defendants, except a person of the name of Clarke, for whom an appearance was duly entered according to the form of the statute by the plaintiffs. Mr. Leeds then, by like authority, consented to a judge's order to stay proceedings on payment of debt and costs. This order not having been complied with, judgment against all the defendants was signed, and execution sued out. Under this execution the goods of Mr. Gordon were seized by the sheriff, Mr. Gordon never having been served with the writ, and having given no authority, direct or indirect, to Mr. Leeds to appear for him. He now applies to have the judgment set aside, either as an irregular judgment, or, if a regular judgment, then on an affidavit of merits, and on payment of costs. The only other material fact mentioned in the affidavit is, that Mr. George Leeds, the attorney by whom the appearance has been entered, is in solvent circumstances.

The rule of law hitherto has generally been considered to be as stated in an anonymous case in *Salkeld*, 86, that "where an attorney takes upon himself to appear, the Court looks no further, but proceeds as if the attorney had sufficient authority, and leaves the party to his action against him;" but they qualified it in *Salkeld*, 88, stating that the judgment was regular, "but that if the attorney be not responsible or suspicious, they would set aside the judgment, for otherwise the defendant has no remedy, and any one may be undone by that means." It must be admitted, that the reasoning is not very clear by which the Court arrived at the conclusion that, in so doing, they did justice to the defendant, for the non-responsibility or suspiciousness of the attorney is but a vague sort of criterion of safety to the defendant, and by the hypothesis the defendant is wholly without blame, and may notwithstanding be ruined. It is true that the plaintiff is equally blameless, but then the plaintiff, if the judgment be set aside, has his remedy against the defendant as before, and suffers only the delay and possible loss of costs.

We are disposed to lay down a different rule, and to confine the liability of the defendant to cases in which the course of the proceedings has given him notice of the action being brought against



him. When, therefore, a defendant has been served with process, and an attorney without authority appears for him, we think the Court must proceed as if the attorney really had authority, because, in that case, the defendant, having knowledge of the suit being commenced, is guilty of an omission in not appearing and making defence by his own attorney, if he has any defence on the merits. There the plaintiff is without blame, and the defendant is guilty of negligence. But even in that case, if the attorney be not solvent, we should relieve the defendant upon equitable terms, if he had a defence on the merits. If the attorney were solvent, it would not be unjust to leave the defendant to his remedy by summary application against him.

On the other hand, if the plaintiff, without serving the defendant, accepts the appearance of an unauthorized attorney for the defendant, he is not wholly free from the imputation of negligence; the law requires him to give notice to the defendant by serving the writ, and he has not done so. The defendant there is wholly free from blame, and the plaintiff not so; and upon the same principle on which we before proceeded, we must set aside the judgment as irregular, with costs, and leave the plaintiff to recover those costs, and the expense to which he has been put, from the delinquent attorney, by summary proceedings. The case of *Hubbart v. Phillips*, 13 M. & W. 702, is an authority for such an application. Now, applying those principles to the present case, it is clear that this judgment is irregular, and the rule must be made absolute for setting it aside.

*Rule absolute.*<sup>1</sup>

<sup>1</sup> As to the effect on domestic and on foreign judgments of an appearance for the defendant by an attorney not authorized by the defendant to appear for him, see *Shelton v. Tiffin*, 6 How. (U.S.), 163, 12 L. ed. 387; *Hill v. Mendenhall*, 21 Wall. (U. S.), 453, 22 L. ed. 616; *Hatfield v. King*, 184 U. S. 162, 46 L. ed. 481, 22 S. Ct. 477; *Harshey v. Blackmarr*, 20 Ia. 161, 89 Am. Dec. 520; *Gilman v. Gilman*, 126 Mass. 26, 30 Am. Rep. 646; *Corbitt v. Timmerman*, 95 Mich. 581, 55 N. W. 437, 35 Am. St. Rep. 586; *Lipps v. Panko*, 93 Neb. 469, 140 N. W. 761; *Denton v. Noyes*, 6 Johns. (N. Y.), 296, 5 Am. Dec. 237; *Vilas v. P. & M. R. R. Co.*, 123 N. Y. 440, 25 N. E. 941, 9 L. R. A. 844, 20 Am. St. Rep. 771. And see Black, *Judgments*, 2nd ed., secs. 325, 374; Freeman, *Judgments*, 4th ed., sec. 563; 3 Cyc. 534; 2 Encyc. Pl. & Pr. 682; and a collection of cases in 21 L. R. A. 848. — Ed.

## CHAPTER IV.

### FORMS OF ACTION.

#### SECTION I.

##### *Actions at Common Law.*

[Chitty, *Pleading* (Sixteenth American Edition), Vol. I, \*109-\*110.]

ACTIONS are, from their subject-matter, distinguished into *real*, *personal*, and *mixed*. *Real* actions are for the specific recovery of real property only, and in which the plaintiff, then called the demandant, claims title to lands, tenements, or hereditaments, in fee-simple, fee-tail, or for term of life, such as writs of right, formedon, dower, &c. *Personal* actions are for the recovery of a debt or damages for the breach of a contract, or a specific personal chattel, or a satisfaction in damages for some injury to the person, personal, or real property. In *mixed* actions, which partake of the nature of the other two, the plaintiff proceeds for the specific recovery of some real property, and also for damages for an injury thereto, as in the instance of an action of ejectment or of waste, or *quare impedit*. We will confine our observations to such *personal* and *mixed* actions as most frequently occur in practice.

*Personal* actions are in form *ex contractu* or *ex delicto*, or, in other words, are for breach of *contract*, or for *wrongs* unconnected with contract. Those upon *contracts* are principally assumpsit, debt, covenant, and detinue; and those for *wrongs* are case, trover, replevin, and trespass *vi et armis*. We will take a concise view of the nature and particular applicability of each of these respective remedies, and of the action of ejectment, and of that of trespass for mesne profit; in effect a branch of trespass *quare clausum fregit*.

[Stephen, *Pleading* (Williston's Edition), \*5-\*9.]

ANCIENTLY it was essential to the due institution of all actions in the Superior Courts, that they should commence by *original writ*; in the case of real and mixed actions this is still necessary. But in personal actions the use of original writs is abolished by the recent statute 2 Will. IV. c. 39.

The *original writ* (*breve originale*) is a mandatory letter issuing out of the Court of Chancery, under the great seal, and, in the

King's name, directed to the sheriff of the county where the injury is alleged to have been committed, containing a summary statement of the cause of complaint, and requiring him to command the defendant to satisfy the claim; and, on his failure to comply, then to summon him to appear in one of the superior courts of common law, there to account for his non-compliance. In some cases, however, it omits the former alternative, and requires the sheriff simply to enforce the appearance.

The original writs differ from each other in their tenor, according to the nature of the plaintiff's complaint, and are conceived in fixed and certain forms. Many of these forms are of a remote and undefined antiquity, but others are of later origin, and their history is as follows. The most ancient writs had provided for the most obvious kinds of wrong; but in the progress of society, cases of injury arose, new in their circumstances, so as not to be reached by any of the writs then known in practice; and it seems that either the clerks of the Chancery (whose duty it was to prepare the original writ for the suitor) had no authority to devise new forms to meet the exigency of such new cases, or their authority was doubtful, or they were remiss in its exercise. Therefore by the statute of Westminster 2, 13 Ed. I. c. 24, it was provided, "That as often as it shall happen in the Chancery, that in one case a writ is found, and in a *like case* (*in consimili casu*) falling under the same right, and requiring like remedy, no writ is to be found, the clerks of the Chancery shall agree in making a writ, or adjourn the complaint till the next parliament, and write the cases in which they cannot agree, and refer them to the next parliament," &c. This statute it will be observed, while it gives to the officers of the Chancery the power of framing new writs *in consimili casu* with those that formerly existed, and enjoins the exercise of that power, does not give or recognize any right to frame such instruments for cases *entirely new*. It seems, therefore, that for any case of that description, no writ could be lawfully issued, except by authority of parliament. But on the other hand, new writs were copiously produced, according to the principle sanctioned by this act, *i. e.*, *in consimili casu*, or upon the analogy of actions previously existing: and other writs also, being added from time to time, by express authority of the legislature, large accessions were thus, on the whole, made to the ancient stock of *brevia originalia*.

All forms of writs once issued, were entered from time to time, and preserved, in the Court of Chancery, in a book called *The Register of Writs*, which in the reign of Hen. VIII. was first committed

to print and published. This book is still in authority, as containing, in general, an accurate transcript of the forms of all original writs as then framed. It seems, however, that a variation from the Register is not conclusive against the propriety of a form, if other sufficient authority can be adduced to prove its correctness.

An original writ (as already stated) was formerly essential in every case, to the due institution of the suit. These instruments have consequently had the effect of limiting and defining the right of action itself; and no cases are even now considered as within the scope of judicial remedy, in the English law, but those to which some known original writ (when these instruments were in universal use) would have applied, or for which some new original writ, framed on the analogy of those already existing, might, under the provisions of the statute of Westminster 2, have been lawfully devised. The enumeration of writs, and that of actions, have become, in this manner, identical.

MITCHELL v. McNABB.

SUPREME JUDICIAL COURT OF MAINE. 1870.

[Reported 58 *Maine*, 506.]

ON exceptions to the ruling of Goddard, J., of the superior court for the county of Cumberland.

Debt, "for that the said defendant, at said Portland, on the 30th day of May, A.D. 1870, by his writing obligatory of that date, sealed with his seal and here in court to be produced, therein sold to the plaintiff the good-will of his business, and therein agreed not to carry on the boot and shoe business in the city of Portland for one year from the date thereof. Yet the said defendant, not regarding his said agreement, did again commence the boot and shoe business in said city of Portland, on the first day of July thereafter, and hath continued to carry on the boot and shoe business in said city of Portland, from said first day of July to the day of the purchase of this writ. And the plaintiff avers that the said defendant, by not keeping his said agreement, has damaged him in his business the sum of two hundred dollars."

To this declaration the defendant filed a general demurrer which the plaintiff joined. The presiding judge sustained the demurrer and adjudged the declaration bad; whereupon the plaintiff alleged exceptions.



The instrument declared on was a formal bill of sale, under seal, with covenants in the usual form, of certain tools used in and about the manufacture of boots and shoes, "together with the good-will of" the vendor's "business." Then followed the agreement, "and I hereby agree not to carry on the boot and shoe business in said city for one year from the date hereof."

The case was not entered upon the district docket, but was certified directly to the chief justice, in accordance with the statute.

APPLETON, C. J. This is an action of debt. The writ is dated Oct. 14, 1870. The declaration sets forth an agreement, under seal, signed by the defendant, in and by which he "agreed not to carry on the boot and shoe business in the city of Portland for one year," from May 31, 1870, and an averment that from the first day of July he "continued to carry on the boot and shoe business in said city of Portland to the day of the purchase of this writ." To this the defendant demurred, the demurrer was sustained, and the plaintiff excepted. The question presented is whether debt is maintainable.

The declaration sets forth no promise to pay any money under any terms or conditions, but simply an agreement to abstain from selling boots and shoes at a particular place and for a stipulated time, and a violation of such agreement. The damages in such case must obviously be uncertain and unliquidated.

Debt lies when one is entitled to receive a certain and liquidated sum of money, or in case of a bond for the payment of money, or the performance of some act under a penalty, or for goods sold and delivered, etc. "Debt," remarks Richardson, C. J., in *Lowell v. Bellows*, 7 N. H. 391, "is the proper action, whenever the demand is for a sum certain, or is capable of being readily reduced to a certainty; but it is not the proper remedy when the demand is rather for unliquidated damages than for money, unless the performance of the contract is secured by a penalty. 1 Chit. Pl. 101." "The true test," remarks Story, J., in *Bullard v. Bell*, 1 Mason, 543, "is, therefore, whether the sum to be recovered has, upon the contract itself, a legal certainty." Debt "lies only for the recovery of a sum of money *in numero*, and not where the damages are unliquidated and incapable of being reduced by averment to a certainty." 1 Chit. Pl. 113. Debt will not lie on a contract of indemnity against unliquidated or unascertained damages. *Flannagan v. Com. Ins. Co.*, 1 Dutch. (N. J.) 506; *Rutan v. Hopper*, 5 Dutch. (N. J.) 112. As the action of debt is for the recovery of a sum of

money, the breach or cause of action complained of must necessarily originate out of the non-payment of the money previously alleged to be payable. But here there was not and could not be the allegation of any sum of money which the defendant was bound to pay, and for the neglect to pay which he should be held responsible in damages. *Exceptions overruled.*<sup>1</sup>

CUTTING, KENT, WALTON and TAPLEY, JJ., concurred.

VAN DEUSEN *et al.* v. BLUM *et al.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1836.

[Reported 18 *Pickering*, 229]

THIS was an action of *debt*. The declaration contained two counts upon a special contract under seal, a third upon a *quantum meruit* for labor performed, and a fourth upon a *quantum valebant* for materials furnished. The defendant Blum was defaulted; the other defendant, Thouvenin, appeared, and to the two first counts he pleaded *non est factum*, and to the third and fourth, *nil debet*.

At the trial, before Morton, J., the plaintiffs produced the contract, purporting to be between themselves of the one part, and Blum and Thouvenin of the other part. Blum and Thouvenin were partners, and were so described in the contract. The plaintiffs had duly executed the contract, and Blum also had executed it by signing the company name "J. C. Thouvenin & Co.," and annexing a seal. There was no evidence that he had any authority to execute the contract in behalf of Thouvenin, or that Thouvenin was present at the execution or ever ratified it.

The judge ruled, that the instrument could not go in evidence to the jury as the deed of Thouvenin.

The contract was for building a dam by the plaintiffs for Blum and Thouvenin, across the Housatonic river; which was a purpose within the scope of the partnership business. The plaintiffs offered to prove that they built the dam and furnished the materials therefor, and they claimed against Thouvenin, under the third and fourth counts, what their work and materials were worth. Thouvenin objected to the admission of this evidence, and contended that there being an express contract executed by the plain-

<sup>1</sup> See also *Flanagan v. Camden Mut. Ins. Co.*, 25 N. J. L. 506. — Ed.

tiffs and Blum, and that contract being in force and binding upon Blum, the plaintiffs' remedy was on that instrument alone.

But the judge ruled, that the plaintiffs might, notwithstanding that contract, recover under the third and fourth counts, upon an implied promise, for all the materials furnished and labor performed before the dissolution of the partnership.

Thouvenin and Blum dissolved partnership on the 10th of November, 1832, and all the partnership property was conveyed to Blum, and he agreed to pay all the partnership debts. The dam was not finished until after the 10th of November, and for the work done previously to that day the jury found a verdict against Thouvenin.

The questions arising upon these facts were reserved for the consideration of the whole Court.

MORTON, J., delivered the opinion of the Court. Debt, as well as assumpsit, will lie on a *quantum meruit* or a *quantum valebant*. 1 Chit. Pl. 107; 2 Wms's Saund. 117 *b*, note; Union Cotton Manufactory *v.* Lobdell, 13 Johns. R. 462. Hence these counts may well be joined with counts upon a specialty. Smith *v.* First Congr. Meetinghouse in Lowell, 8 Pick. 178.

It was long doubted, whether a man, who performed work in consequence of a special contract, but not in conformity to it, could recover for the services rendered and materials found. There are many and conflicting authorities on the subject. They have all been carefully examined and compared, and the rule established by our Court, as we think, according to the principles of justice and the weight of authority. He who gains the labor and acquires the property of another, must make reasonable compensation for the same. Hayward *v.* Leonard, 7 Pick. 181; Smith *v.* First Congr. Meetinghouse in Lowell, 8 Pick. 178; Munroe *v.* Perkins, 9 Pick. 298; Brewer *v.* Tyringham, 12 Pick. 547.

The general authority derived from the relation of partnership, does not empower one partner to seal for the company or to bind them by deed. It requires special power for this purpose. See Cady *v.* Shepherd, 11 Pick. 400, and the cases there cited. Here was no evidence of any previous authority or subsequent ratification. The sealed instrument executed by one partner in the name of the firm, might bind him, but could not be obligatory upon the company. And although the plaintiffs might have had a remedy upon the contract against the party who executed it, yet they were not bound to rely upon him alone.

The services never were rendered either in conformity to or under such an agreement. The plaintiffs undertook to execute a contract between themselves and the company. But there being no such contract in existence, they are left to resort to their equitable claim for their labor and materials. So far as these benefited the company, the plaintiffs are entitled to recover against them.

*Judgment on the verdict.*<sup>1</sup>

VAN SANTWOOD and Another v. SANDFORD.

SUPREME COURT OF NEW YORK. 1815.

[Reported 12 *Johnson*, 197.]

THIS was an action of covenant. The declaration contained four counts. The fourth count, that certain differences having arisen between the plaintiffs and one Isaac Newton, they, on the 22d of March, 1814, entered into articles of agreement, in the words following; (setting forth the agreement to submit to arbitration *verbatim*) — “And hereupon the said defendant, on the 24th day of March, in the year aforesaid, entered into a guaranty, covenant, and agreement, in the words and figures following, to wit: (setting forth the agreement of the defendant *verbatim*): and which concluded in the following words: “signed and sealed the 24th day of March, 1814. Stephen Sandford, (L. S.)” And by which the defendant guaranteed the performance of the award of the arbitrators on the part of Newton, to the amount of 800 dollars. The plaintiffs, in this court, then stated an award of the arbitrators, that Newton should pay to them, 680 dollars and 36 cents, in two days thereafter, and notice of the award to Newton, and to the defendant, that neither of them had paid the money; and that the defendant had not kept his said covenant and guaranty so by him made, &c.

To this count there was a demurrer and joinder.

SPENCER, J., delivered the opinion of the court. The demurrer to the fourth count is well taken; the action is covenant, and it

<sup>1</sup> See *Seretto v. Rockland, etc., Ry.*, 101 Me. 140, 63 Atl. 651; *Thompson v. French*, 10 Yerg. (Tenn.), 452. But see *Young v. Ashburnsham*, 3 Leon. 161. As to the general scope of the action of debt, see 1 Chitty, Pleading, 16th Am. ed., \*121. As to the history of the action, see Ames, Lectures on Legal History, 88, 122; 8 Harv. L. Rev. 252. — Ed.



cannot be maintained but on a deed. The only averment or allegation of a deed is, "and hereupon the defendant, on the 24th day of March, in the year aforesaid, entered into a guaranty, covenant, and agreement, in the words and figures following;" then the agreement is set out *in hæc verba*, with a conclusion, that it was signed and sealed with the name of the defendant, and the *locus sigilli*, purporting to be a literal oyer of the agreement.

It must appear that the contract was under seal, and the law will not intend that it was sealed, unless it be expressly averred to be so, and though the bond or deed, upon oyer, recite, "in witness whereof we have hereunto set our hands and seals," yet that does not amount to such an averment, but that the party must show that the bond or deed was actually sealed by the other. These principles will be found in *Cabel v. Vaughan*, 1 Saun. 291, note 1, where all the cases are carefully and accurately collected. There are some words of art, such as indenture, deed, or writing obligatory, which, of themselves, import that the instrument was sealed; but if it be alleged that J. S. by his certain writing, demised or covenanted, without averring that it was sealed, the court will not intend that the writing was sealed. Cro. Eliz. 571; Ld. Ray. 2537; 8 Com. Dig. Fait (A. 2) Pleader, 2 W. 9, 14.

In the case of *Warren v. Lynch*, 5 Johns. 244, this court decided that a scrawl for a seal, with an (L. S.) was not a seal, and deserved no notice, and that calling a paper a deed will not make it one, if it want the requisite formalities. The oyer of the contract, therefore, set out in the count under consideration, can have no effect; for we cannot tell that the original differs from it, or possesses any of the properties of a seal.

The other objections taken by the defendant's counsel are not tenable, but it is not now necessary to consider them, as the count is bad for the reasons assigned.

Judgment for the defendant, with leave to amend on the usual terms.<sup>1</sup>

<sup>1</sup> See also *More v. Jones*, 1 Barn. K. B. 61, 85.

For the scope of the action of covenant, see 1 Chitty, Pleading, 16th Am. ed., \*129. — Ed.

## MCKAY v. DARLING.

SUPREME COURT OF VERMONT. 1893.

[Reported 65 *Vermont*, 639.]

START, J.<sup>1</sup> The action is assumpsit and the plaintiff seeks to recover for services in sawing lumber, drawing slabs, and for damages sustained by him by reason of the defendant's failure to furnish slabs pursuant to his agreement. These items are all provided for in a written contract under seal and from the facts reported by the referee, we cannot say as a matter of law that the sealed instrument has been changed or modified.

By the sealed instrument the plaintiff was required to saw the lumber in question, the price to be paid therefor by the defendant and time of payment being provided for therein.

Each party was to pay one-half of the expense of drawing away the slabs and the defendant was to furnish the plaintiff with slabs for use in his engine. The referee has found that the sawing was done under this contract; that the defendant, under the contract, should pay one-half of the expense of getting the slabs away from the mill; and that the defendant failed to furnish the slabs stipulated in the contract. From these findings, it is clear that the parties have acted under the sealed contract, and that there has been no modification of it. There having been no subsequent parol modification of the contract, and the plaintiff having performed the service under the contract in reliance upon it, and the omission of the defendant being an omission to perform and keep the covenants contained in the sealed instrument, the action of assumpsit cannot be sustained. The plaintiff has a remedy by an action of covenant upon the sealed contract, and having this remedy he cannot waive it and bring assumpsit. *Myrick v. Slason*, 19 Vt. 121; *Camp v. Barker*, 21 Vt. 469; *King, Fuller & Co. v. Lamoille Valley R. R. Co.*, 51 Vt. 369; *Wood et al. v. Edwards et al.*, 19 Johns. 205; *Codman v. Jenkins*, 14 Mass. 93. In *Myrick v. Slason*, *supra*, it is held that when a party has a remedy by an action of covenant on a contract under seal, he is precluded from suing in assumpsit. . . .

*The pro forma judgment is reversed and judgment rendered for the defendant to recover his costs.*<sup>2</sup>

<sup>1</sup> The statement of facts and a part of the opinion are omitted. — Ed.

<sup>2</sup> *Drew v. Western Union Tel. Co.*, 111 Me. 346, 89 Atl. 144, *accord*. Compare *Baldwin v. Emery*, 89 Me. 496, 36 Atl. 997. — Ed.

FELTON *v.* DICKINSON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1813.

[Reported 10 *Massachusetts*, 287.]

THE declaration in this case, besides several uncontested counts on promissory notes, contained an *indebitatus assumpsit* for two hundred dollars in consideration of work and labour performed for the defendant by the plaintiff and at his request, and a *quantum meruit* for the same work and labour.

The evidence in support of these counts, given at the trial of the cause upon the general issue before Parker, J., at the last April term in this county, was — that the father of the plaintiff, when the latter was about fourteen years of age, placed him in the service of the defendant, upon an agreement that the plaintiff was to remain in that service until he should arrive at the age of twenty-one years; during which time the defendant promised to support him in food and clothing, and at the end of the term of service that he would pay him two hundred dollars in money, or convey to him a certain lot of land in Vermont, if the plaintiff should chuse to take it. — It was agreed that the plaintiff had served out his time; and it was in evidence that he had been to Vermont to examine the land, and before the commencement of this suit had signified to the defendant his refusal to accept it. — The defendant objected that this evidence could not support either of the counts:— 1st. Because it proved a special contract, which ought to have been set forth. — 2d. Because the promise, as proved, was made to the father, and not to the plaintiff. — Both these objections being overruled by the judge, a verdict was returned for the plaintiff; and the defendant moved for a new trial on the above grounds.

*Per curiam.* Two objections are made to the verdict in this case. — First, that the special matter proved was not properly admitted to support a general *indebitatus assumpsit*: — and secondly, that the promise being made to the father, he was entitled to the action, and not the present plaintiff, the son.<sup>1</sup>

The *first* objection merits some consideration. It is undoubtedly true, that where there is a special agreement relative to the performance of work and labour, the declaration ought to state that agreement; in order that the defendant may be apprized of the

<sup>1</sup> The part of the opinion in which it was held that the second objection was not valid, is omitted. — Ed.

contract he is charged with breaking, and may have opportunity to shew the want of performance, on the part of the plaintiff, of those stipulations, which may have been the foundation or consideration of the promise made by the defendant.

But where there has been a special agreement, the terms of which have been performed, so that nothing remains but a mere duty to pay money, there seems to be no reason why a general count should not be sufficient for the recovery of the sum due. . . .

*Judgment on the verdict.*<sup>1</sup>

### WALKER *v.* JONES.

COURT OF EXCHEQUER. 1834.

[Reported 2 *Crompton & Meeson*, 672.]

IN this case, which was an action of detinue, the defendant pleaded a plea traversing the delivery; to which there was a demurrer. On the demurrer being called on for argument,

Comyn stated, that the plea had been drawn from a precedent in Chitty, 3 Chit., 4th ed., 1028; but that, after the case of Gledstane *v.* Hewitt, 1 C. & J. 565, from which it appeared that the bailment in detinue was immaterial, he could not support the plea.

The plea was ultimately struck out on payment of costs.

### HEFNER *et al.* *v.* FIDLER.

SUPREME COURT OF APPEALS OF WEST VIRGINIA. 1905.

[Reported 58 *West Virginia*, 159.]

SANDERS, J. This is an action of detinue, instituted before a justice of the peace of Gilmer county, for the recovery of the possession of two certain promissory notes of \$62.50 each. Upon the trial of the case, both before the justice and upon appeal to the circuit court, judgment was rendered in favor of the plaintiffs, and to this judgment a writ of error and *supersedeas* has been allowed.

The defendants sold to the plaintiffs one four-horse power engine and boiler, for the sum of \$125.00, to be paid in two equal payments of \$62.50 each, for which they executed the said two notes. The plaintiffs claim that shortly after the consummation of the

<sup>1</sup> For the scope of the action of assumpsit, general and special, see 1 Chitty, Pleading, 16th Am. ed., \*110. For the history of the action see Ames, *Lectures on Legal History*, 129-171; 2 Harv. L. Rev. 1, 53. — Ed.



trade, by the execution of the notes and delivery of the engine and boiler, they discovered that the defendant had knowingly made false and fraudulent representations to them in regard to said engine and boiler for the purpose of misleading and deceiving them, and which did mislead and deceive them, to their prejudice, and for which they claim they are entitled to rescind the contract; and to this end they offered to return the engine and boiler to defendant, and demanded possession of the notes, and defendant claimed that he had assigned the notes away, and could not comply with their offer.

The first question that confronts us, is, does the action of detinue lie? In order to ground the action, these points are necessary: (1) the plaintiff must have property in the thing sought to be recovered; (2) he must have the right to its immediate possession; (3) it must be capable of identification; (4) it is essential that the property be of some value; and (5) the defendant must have had possession at some time before the institution of the action.

The authorities universally hold that the action of detinue will lie to recover the possession of a promissory note. Some of these are: 1 Barton's Law Pr. 214; 1 Chitty Pl. (11 Ed.) 121; Cooper v. Mastin, 73 Ala. 252; Rob v. Cherry, 98 Tenn. 72 (38 S. W. 412); Lewis v. Horner, 24 Ky. 500; 19 Am. Dec. 120; Robinson v. Peterson, 40 Ill. App. 132; Carter v. Turner, 37 Tenn. 178.

But while this action will lie to recover the possession of a promissory note, yet one, to maintain it, must bring himself within the rule herein stated. As we have seen, the plaintiff must have property in the thing sought to be recovered, and it must be of some value. Then, the pertinent inquiry is, what property have the plaintiffs in the notes sought to be recovered, and what is their value? When recovered by the plaintiffs, they are of no value to them; it could only be the possession by them of evidence of outstanding indebtedness. If the theory of the plaintiffs is correct, that they have the right to rescind, and have rescinded, the contract, the notes are also of no value to the defendant, he having lost the right to recover on them. If, however, he has not lost the right to recover, he would be in the lawful possession of them, and the plaintiffs' action could not, for that reason, be maintained.

The plaintiffs are deprived of nothing of value to them by reason of the detention of the notes. It may be claimed that the defendant may sue upon them; if so, the plaintiffs can make any defense which they may have. If they have the right to rescind the contract, they can set this up as a defense. Then, again, the notes

should have an alternative value. A judgment in detinue should be for the specific property, of a specified value, so that, if the property cannot be had, its value may be recovered. Certainly a judgment could not be given for the plaintiffs for the face value of these notes, for they have no such value in them. Would they be of that value to the plaintiffs, if recovered? This question must be answered in the negative. Then, if not, how could they have a judgment for the value of a thing which is valueless? In the case of *Todd v. Crookshanks*, 3 Johns. (N. Y.), the plaintiff brought an action to recover the possession of a note which he had paid, and had taken a receipt, showing payment in full; and the court, speaking in this case, says: "There was no foundation for the action below. After the note was paid, a receipt in full given by one of the payees, it was completely discharged, so as to be of no value."

For these reasons, the judgment of the circuit court is reversed, the verdict of the jury set aside, and the action dismissed.

*Reversed.*<sup>1</sup>

#### DALTON v. FAVOUR.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1826.

[Reported 3 *New Hampshire*, 465.]

TRESPASS on the case, for that the said Favour, on the 27th September, 1825, at D., having in his hands a firelock, highly charged with powder, and a great quantity of wadding, so exceedingly carelessly managed his said firelock, that he discharged its contents into the foot of the plaintiff; whereby he was put to great pain, &c.

The cause was tried here, upon the general issue, at November term, 1825; when it appeared in evidence, that the plaintiff was standing in an entry of a house in sight of the defendant, who was about six feet distant from him, when the defendant discharged the firelock and wounded the plaintiff in his foot; but it did not appear, that the firelock was discharged with the intent to injure the plaintiff, but the accident was the consequence of great carelessness.

<sup>1</sup> As to the scope and history of the action of detinue, see *Kettle v. Bromsall*, Willes, 118; *Dame v. Dame*, 43 N. H. 37; 1 Chitty, Pleading, 16th Am. ed., \*135; Ames, Lectures on Legal History, 71. — Ed.

*Webster*, for the defendant, objected, that case could not be supported on the facts proved in the case; but the court overruled the objection; and the jury having returned a verdict for the plaintiff, he moved the court to grant a new trial, on the same ground.

*Smiley*, for the plaintiff.

RICHARDSON, C. J., delivered the opinion of the court.

The principles, upon which the decision of this case must depend, are well settled in the books.

In all cases, where the injury is done with force and immediately by the act of the defendant, trespass may be maintained. 1 Chitty's Pl. 122. — 3 East, 593, *Leame v. Bray*. — 19 Johns. 381. — 18 ditto, 257, *Percival v. Hickey*.

And in every case, where the injury is the immediate effect of the defendant's act, and is stated in the declaration, or appears upon the trial, to have been wilfully done, the remedy must be trespass. 1 Chitty's Pl. 127. — 8 D. & E. 188, *Ogle v. Barnes*. — 6 D. & E. 128. And *Savignac v. Roome*, 6 D. & E. 125. — 5 D. & E. 648, *Day v. Edwards*.

But where the damage or injury ensues, not directly from the act of the defendant, the remedy must be case. 1 Chitty's Pl. 126.

In all cases, where the injury is attributable to negligence, although it were the immediate effect of the defendant's act, the party injured has an election, either to treat the negligence of the defendant as the cause of action, and declare in case; or to consider the act itself as the cause of the injury, and to declare in trespass. 1 Chitty's Pl. 127. — 5 Bos. & Puller, 117, *Rogers v. Imbleton*. — 3 Burrows 1560. — 5 B. & P. 447, note. — 3 East, 600 and 601. — 8 D. & E. 188, *Ogle v. Barnes*. — 14 Johns. 432, *Blin v. Campbell*, where it was decided, that case might be maintained for wounding the plaintiff's leg, by negligently firing a pistol. 1 Bos. & Puller 472, *Turner v. Hawkins*.

In the case now before us, it did not appear, that the injury was wilfully done, but it was the consequence of great carelessness. This is an instance then, where either trespass or case may be maintained; and there must be

*Judgment on the verdict.*<sup>1</sup>

<sup>1</sup> As to the scope of the actions of trespass and case, see *Scott v. Shepherd*, 2 Bl. 892, and the notes thereto, in *Smith's Leading Cases*, 6th ed., 425; 9th Am. ed., 745; *Leame v. Bray*, 3 East, 593; 1 Chitty, Pleading, 16th Am. ed. \*140, \*148, \*186.

## LIENOW v. RITCHIE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1829.

[Reported 8 *Pickering*, 235.]

THIS was an action on the case brought by the owner of a house for cutting away a part of it while it was in the occupation of his tenant for the term of one year. After a verdict for the plaintiff, it was moved in arrest of judgment, that trespass, and not case, was the proper form of action.

*Per Curiam.* The facts found show a proper ground for an action on the case. The plaintiff, not being in actual possession, nor having the right to possession against his lessee, could not maintain trespass. Case is the proper remedy for the landlord, when an injury is done to the inheritance.

The case of *Starr v. Jackson* [11 Mass. 520] affirms this doctrine, and only decides that trespass *may* be maintained by the landlord when the lessee is only tenant at will, not that case, even under those circumstances, would not lie.

*Judgment according to verdict.*<sup>1</sup>

SWIFT v. MOSELEY *et al.*

SUPREME COURT OF VERMONT. 1838.

[Reported 10 *Vermont*, 208.]

TROVER, for two oxen, three cows and nine sheep.

Plea — Not guilty.

On the trial of the cause in the county court, it appeared in evidence, that, in the spring of 1835, the plaintiff leased a farm, lying in Bridport (of which he was possessed in right of his wife), together with the above mentioned cattle and sheep, to one Jirah Swift, for the term of one year. By the terms of said lease, the

<sup>1</sup> Trespass cannot be brought by a lessor for life or years. *Halligan v. Chicago*, etc., R. R. Co., 15 Ill. 558; *Lawry v. Lawry*, 88 Me. 482, 34 Atl. 273.

For conflicting views as to the right of a landlord when the premises are in the possession of a tenant at will, see *Hingham v. Sprague*, 15 Pick. (Mass.), 102; *Roussin v. Benton*, 6 Mo. 592; *Van Ness v. N. Y. & N. J. Tel. Co.*, 78 N. J. L. 511, 74 Atl. 456; *Campbell v. Arnold*, 1 Johns. (N. Y.), 511. See Ames, *Lectures on Legal History*, 228.

As to the form of action for an injury to an incorporeal right, see *Wetmore v. Robinson*, 2 Conn. 529; *Wilson v. Smith*, 10 Wend. (N. Y.), 324; *Union Petroleum Co. v. Bliven Petroleum Co.*, 72 Pa. 173. — ED.



plaintiff and said Jirah Swift, were, at the end of the year, to divide the profits of the farm and the increase of the stock, equally between them, which stock was to remain upon the farm during the year, unless sold or taken off by the consent of the plaintiff and said Jirah Swift; — that some time in the month of August, 1835, the said Jirah Swift sold said cattle and sheep to the defendants, without the consent of the plaintiff, and absconded, and that the defendants, immediately after making the purchase, drove the cattle and sheep away from the farm. The plaintiff introduced testimony tending to prove, that the defendants knew that Jirah Swift had no right to dispose of the cattle and sheep, and that they purchased them much under their value. Upon this evidence, the county court decided, that this action could not be sustained, as the plaintiff brought the suit previous to the termination of said lease, by the terms of which he had parted with his right of possession of the property in question, during its continuance, and rendered a judgment for the defendants, to which decision the plaintiff excepted.

REDFIELD, J. It seems to be well settled, that the plaintiff, in trespass *de bonis asportatis*, or trover, in order to maintain the action, must have had, at the time of the injury complained of, either the actual custody of the thing injured or taken, or a property in it, either general or special, with the right to immediate possession. If he had the actual custody of the thing, even wrongfully, he may maintain the action against every one, whose right is not superior to his. Perhaps a mere servant could not be said to have any such custody. His possession is that of the master. The general owner of a chattel may always maintain the action, unless he have parted with the possession, for a "definite term." *Ward v. Macauley*, 4 T. R. 489. Lord Kenyon in that case intimates an opinion, that trover will lie, but in *Gordon v. Harper*, 7 T. R. 12, it is expressly held, that case is the only remedy for an injury done to the thing bailed, during the continuance of the bailment.

In the present case it is contended, that the act of the lessee or bailee, in selling to the defendants, did, *ipso facto*, determine his right, and revive the right of the plaintiff to immediate possession. If so, the plaintiff may maintain this action. It may be well to inquire what acts will determine a bailment of this character.

It is certain the act of a mere stranger will not operate to revive the plaintiff's right to immediate possession. Any misuse or abuse of the thing bailed, in the particular use for which the bailment was

made, will not enable the general owner to maintain trespass or trover against the bailee. His only remedy is ease. But if the thing be put to a *different* use from that for which it was bailed, by the consent of the bailee, we think the bailor may maintain trespass or trover.

It has been long settled that if the bailee kill or destroy the thing bailed, trespass or trover will lie. Coke's In. a. 53. It was early held, too, that the interest of the tenant in standing trees was so far determined by their being severed from the freehold, that the landlord might maintain trespass.

In the case of *Farrant v. Thompson*, 5 Barn. & Ald. 826, found in the 7th Com. Law R. it was held that machinery, leased and by the lessee severed from the freehold, became *instantly* re-vested in the lessor, and he might maintain trover even during the continuance of the term. The case is expressly put by the court upon the ground, that the lessee, by his wrongful act, forfeits his right, and thus "puts an end to his qualified possession." If so in that case, much more in this, where the bailee sells the property. The same doctrine here decided is held in the case of *Sanborn v. Coleman*, 6 N. H. R. 14.

*The judgment of the County Court is reversed and a new trial granted.*<sup>1</sup>

## OXLEY *v.* WATTS.

KING'S BENCH. 1785.

[Reported 1 *Term Reports*, 12.]

THIS was an action of trespass for taking a horse, tried before Lord Mansfield, at the last Summer Assizes, at Maidstone.

The defendant, as bailiff of Lord Dartmouth, lord of the manor of A. justified taking the said horse as an estray.

Replication, that after the taking mentioned in the declaration,

<sup>1</sup> As to the right to bring trover, see *Gordon v. Harper*, 7 T. R. 9; *Bryant v. Wardell*, 2 Exch. 479; *Ames v. Palmer*, 42 Me. 197; *United Shoe Machinery Co. v. Holt*, 185 Mass. 97, 69 N. E. 1056. See also 1 Chitty, Pleading, 16th Am. ed., \*163; Ames, Lectures on Legal History, 80.

As to the right to bring trespass, see *Lotan v. Cross*, 2 Camp. 464; *Ward v. Macauley*, 4 T. R. 489; *Forbes v. Parker*, 16 Pick. (Mass.), 462; *Gay v. Smith*, 38 N. H. 171. See also 1 Chitty, Pleading, 16th Am. ed., \*188; Ames, Lectures on Legal History, 56. — ED.

the defendant worked the said horse, and so became a trespasser *ab initio*.

*Erskine* now moved to set aside the verdict which had been obtained by the plaintiff, on the ground that this should have been an action on the case for the consequential damage, and not an action of trespass, because the original taking was admitted to be lawful.

But *per Curiam*, The subsequent usage is an aggravation of the trespass in taking the horse; for the using made him a trespasser *ab initio*. *Rule refused.*<sup>1</sup>

### GALLOWAY v. BIRD and Another.

COURT OF COMMON PLEAS. 1827.

[Reported 4 *Bingham*, 299.]

REPLEVIN for taking and unjustly detaining Plaintiff's goods. The goods had been delivered by one Bache to the Defendants, who were carriers and lightermen, consigned to the Plaintiff, and the Defendants refused to deliver the goods to the Plaintiff.<sup>2</sup>

BEST, C. J., now delivered the judgment of the Court. This was an action of replevin, but the goods which were replevied had been delivered to the avowants upon a contract. The authorities all lay it down that replevin can only be maintained where goods are taken, not where they are delivered upon a contract; and this is clear also upon the form of pleading, which always is that the defendant "took and detained" the goods; the plea to which allegation is, *non cepit*. No instance can be found in the Digests or Abridgments of replevin having been brought upon a delivery under a contract. Our judgment therefore must be for the Defendants. *Judgment for the Defendants accordingly.*<sup>3</sup>

<sup>1</sup> See *The Six Carpenters' Case*, 8 Co. 146a, and the notes thereto in *Smith's Leading Cases*, 9th Am. ed., 265. — Ed.

<sup>2</sup> The statement of facts is abridged. — Ed.

<sup>3</sup> *Woodward v. Grand Trunk Ry. Co.*, 46 N. H. 524, *accord*. *Baker v. Fales*, 16 Mass. 147; *Stoughton v. Rappallo*, 3 Serg. & R. (Pa.), 559, *contra*.

By statute in many states the action of replevin has been extended to cover wrongful detention. See *Burrage v. Melson*, 48 Miss. 237; *Kittredge v. Holt*, 55 N. H. 621; *Ames, Lectures on Legal History*, 70. — Ed.

## MITCHELL v. ROBERTS.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE. 1871.

[Reported 50 *New Hampshire*, 486.]

REPLEVIN, by Grenville A. Mitchell & a. against Moses Roberts, for one horse, sleigh, harness, whip, and buffalo robe. Plea, *non cepit*, with a brief statement setting forth a seizure of the property by one Willis, a deputy sheriff, upon an execution in favor of the defendant against one Gordon; an advertisement of it to be sold at auction by the officer, and the taking it out of his possession on the day appointed for the sale by virtue of this writ of replevin, by means of which the sale was prevented; and alleging that the goods were the property of said Gordon, or Gordon & Mitchell, and not of the plaintiff.

Upon the trial by the court, it appeared that upon an execution issued on a judgment in favor of said Roberts against said Gordon, this property was seized by said deputy sheriff as the property of said Gordon, at a hotel where it then was, and that he duly advertised it for sale by auction; that the sale was twice adjourned, the property in the mean time being kept at said hotel stable, under the control of the officer, and that it was taken from his custody by virtue of this writ of replevin, on the day appointed for the sale, and before the time fixed for it.

It appeared, also, that the defendant directed the officer to seize the property upon the execution, and that at the time it was replevied it was in the custody of the deputy sheriff under said execution. Upon this evidence, the court found that the defendant did not take said goods and chattels, or any part thereof, in manner and form as the plaintiff in his declaration had alleged; to which finding the plaintiff excepted.

FOSTER, J. The case finds that the property was taken by a deputy sheriff upon an execution in favor of the defendant against one Gordon, and that, until taken from his custody by virtue of the writ of replevin, the property remained under the officer's control. The defendant never had actual possession of the property, nor constructive possession, unless the officer is to be regarded as his agent, he having been directed by the defendant to seize the property upon the execution.

Replevin is strictly a possessory action: that is, as expressed by Blackstone, 2 Com. 198, "such wherein the right of possession only, and not of property, is contested." And it lies only in behalf of one



entitled to possession, against one having, at the time the suit is begun, actual or constructive possession and control of the property. *Brockway v. Burnap*, 12 Barb. 347; *King v. Orser*, 4 Duer 431; *Roberts v. Randel*, 3 Sandf. 707; *Knapp v. Smith*, 27 N. Y. 281; *Richardson v. Reed*, 4 Gray 442; *Coffin v. Gephart*, 18 Iowa 256.

It is a proceeding *in rem*, wherein the plaintiff seeks to recover the thing detained *in specie*, and not, as in trespass or trover, damages for its detention.

The actual possession of the officer is not the constructive possession of the defendant, although the execution in the officer's hands was levied upon this property by the direction of the defendant; but, until the property passed out of the officer's control by sale upon the execution or other legal means, it remained in the custody of the law, and in no way subject to the defendant's control, who, by virtue of his judgment and execution, acquired no title whatever to the property, nor any right of custody thereof, but only an inchoate right to payment out of its avails, by legal proceedings under and by virtue of the execution. *Gallagher v. Bishop*, 15 Wis. 282; *Ilsley v. Stubbs*, 5 Mass. 283; *Booth v. Ableman*, 16 Wis. 460; *Smith v. Orser*, 43 Barb. 187; *Repine v. McPherson*, 2 Kan. 340; *Willard v. Kimball*, 10 Allen, 211.

The right to the writ while the goods are in the custody of the law, or of a sheriff, collector of taxes, or other officer acting under authority of the State, is denied by statute in Pennsylvania and New York. *Morris on Replevin*, 83, 113, 114.

"The writ of replevin," says Metcalf, J., in *Richardson v. Reed*, 4 Gray, 442, "assumes that the goods which are to be replevied have been taken, detained, or attached by the defendant, and are in his possession or under his control; and it directs that they shall be replevied and delivered to the plaintiff, provided he shall give bond, conditioned, among other things, to restore and return the same goods to the defendant and pay him damages, if such shall be the final judgment in the action. But attached goods are in the legal custody and possession of the officer only. The attaching creditor has no property in them, general or special; no right to the possession of them; and no right of action against a third person who may take them from the officer or destroy them. *Ladd v. North*, 2 Mass. 516.

And even if, in any sense, the possession of the officer could be regarded as the possession of the defendant, still this action could not be maintained. It is well settled in this State that replevin will not lie against an officer for goods taken on execution from the

possession of the judgment debtor. Kellogg v. Churchill, 2 N. H. 412; Smith v. Huntington, 3 N. H. 76; Melcher v. Lamprey, 20 N. H. 403; Sanborn v. Leavitt, 43 N. H. 473; Hilliard on Remedies for Torts, 29.

Therefore it was once held that the recaption by process of replevin, of goods taken by an officer on execution, should be regarded as *contempt* of the court issuing the execution — Winnard v. Foster, 2 Lutw. 1190; and in Rex v. Monkhouse, 2 Strange, 1184, the court granted an attachment against the under-sheriff of Cumberland, for granting a replevin of goods distrained on a conviction for deer-stealing.

Our statute, authorizing replevin against the officer for goods attached upon mesne process, does not, of course, apply to this case; but the common law rule prevails, with this statutory exception, that goods in the custody of the law cannot be replevied.

It was formerly held, in one or two New York cases, that replevin might be maintained against the judgment creditor under whose direction the officer took the goods, on the ground that, as both the officer and creditor were trespassers, replevin would lie against either of them, because it would lie wherever trespass *de bonis asportatis* would. Allen v. Crary, 10 Wend. 349; Stewart v. Wells, 6 Barb. 79. But this doctrine, utterly inconsistent as it is with the theory which regards the possession of an officer of the court as the possession and custody of the law, has been long since exploded in the only State where, so far as I can ascertain, it ever temporarily prevailed. And it is now held that this doctrine, and the dictum of Cowen, J., in Cary v. Hotailing, 1 Hill, 311, that trespass and replevin are concurrent remedies, must be taken with the qualification that the defendant is in possession when the action is brought. Brockway v. Burnap, before cited.

It is undoubtedly true, that at common law replevin will not lie where trespass cannot be maintained; for by that law an unlawful taking of goods is a prerequisite to the maintenance of replevin. Richardson v. Reed, before cited. But it does not follow that trespass will not lie in many cases where replevin will not. Trespass will lie against the wrongful taker of goods, whether he has parted with the possession of them or not; but replevin will in no case lie against one who has transferred his possession to another.

The plaintiff's exception to the finding of the court, therefore, is overruled.

It remains to consider whether the defendant is entitled to judgment for damages. By the common law, if the plaintiff in replevin

did not prevail in his suit, the defendant had judgment for a return of the property; and by the Statute of Westminster, 2 c. 2, the sheriff executing the writ of replevin was required to take pledges, not only for prosecuting the suit, but for a return of the property if a return should be adjudged. But neither the common law, in this respect, nor the statute of Westminster, ever prevailed in this State, — instead of which, by our practice, a judgment for the defendant for damages in the same suit (by which anomalous proceeding the defendant becomes the actor or plaintiff) is the proper judgment. *Bell v. Bartlett*, 7 N. H. 178.

The process *de retorno habendo* prevails in Massachusetts, and is secured by the replevin bond. But the pertinent inquiry of Mr. Justice Metcalf, in *Richardson v. Reed*, is at once suggested by the peculiar aspect of this case: "How can the goods be returned, on a writ *de retorno habendo*, to him who never had possession of them nor the right of possession? Or how can he be entitled to damages for the taking and detaining of goods in which he had no property?"

The plea of *non cepit* admits the property to be in the plaintiff; and, of course, on that plea the defendant cannot have judgment for damages. *Johnson v. Wollyer*, 1 Strange, 507.

The defendant will have

*Judgment for his costs.*<sup>1</sup>

## MURPHY v. BOLGER BROTHERS.

SUPREME COURT OF VERMONT. 1888.

[Reported 60 *Vermont*, 723.]

EJECTMENT in common form. Plea, general issue. Trial by court, March Term, 1886, Ross, J., presiding. Judgment for the plaintiff to recover of the defendants the seisin and peaceable possession of the premises and one cent damages and costs.

<sup>1</sup> As to the necessity of possession by the defendant at the time the action is brought, see *Ramsdell v. Buswell*, 54 Me. 546; *Calnan v. Stern*, 153 Mass. 413, 26 N. E. 994; *Gildas v. Crosby*, 61 Mich. 413, 28 N. W. 153; *House v. Turner*, 106 Mich. 240, 64 W. N. 20. Compare *Ames v. Mississippi Boom Co.*, 8 Minn. 467.

As to the right to replevy property in the hands of a public officer, see *Simpson v. St. John*, 93 N. Y. 363 (police clerk); *Cobbey*, *Replevin*, 2d ed., Ch. 13; *Wells*, *Replevin*, 2d ed., Ch. 11.

As to the general scope of the action of replevin at common law, see 1 *Chitty, Pleading*, 16th Am. ed., \*181. — Ed.

The plaintiff and the defendants were adjoining landowners, and there was a dispute between them as to the exact location of their division line. The defendants' land was described by courses and distances, and its east line was controlled by the east line of a store building standing upon it. The plaintiff's land was simply bounded by the defendants'. The plaintiff did not claim that the defendants had invaded his property upon the land itself, but did claim that they, in changing the location and making repairs of their buildings, had projected the side of a roof on a barn and on a shed, some sixteen feet from the ground, over the division line and over the land of the plaintiff. Both parties had caused accurate surveys to be made, and they only differed in that one surveyor, who fixed the line for the defendants, located his line from the side of the old store building, while the surveyor for the plaintiff located his by the foundation walls of the same building. The court found that the survey made for the defendants was of the correct line, but that the projection of the side of said roof, as the same was built by the defendants, did extend over said division line and slightly over the land of the plaintiff.

After this suit was commenced, and after the surveys had been made, but before the trial, the defendants had cut away the entire projection of the roof of their buildings, so that at the time of trial no part of said buildings came to the line, but said buildings were entirely upon lands of the defendants.

TYLER, J. The question in this case is whether the plaintiff can maintain the action of ejectment, or should have resorted to an action on the case as for a nuisance.

This action, which was originally employed in England to enable the lessee of lands, who had been ejected therefrom during his term, to recover damages therefor, was subsequently enlarged to enable him also to recover possession of the land. In later years it has been used both in England and in this country to try questions involving the title to real estate. Under our statute, sec. 1247, R. L., a person having claim to the seisin or possession of lands, tenements or hereditaments, is entitled to an action by writ of ejectment, and if he recover judgment it shall be for his damages and the seisin and possession of his lands.

Chitty, vol. 1, page 188, defines the action as sustainable for the recovery of the possession of property upon which an entry might in point of fact be made, and of which the sheriff could deliver actual possession, and as not in general sustainable for the recovery of property which is not tangible.



Tyler on Ejectment says, page 37, that by the common law and the general rule, ejectment will not lie for anything whereon an entry cannot be made, or of which the sheriff cannot deliver possession; that it is only maintainable for corporeal hereditaments; that anything attached to the soil, of which the sheriff can deliver possession, may be recovered in this action.

The action of ejectment will lie whenever a right of entry exists, and the interest is of such a character that it can be held and enjoyed, and possession thereof delivered in execution of a judgment for its recovery. *Rowan v. Kelsey*, 18 Barb. 484; *Jackson v. Buel*, 9 Johns. 298.

The precise question in the case at bar is whether the projection of the side of defendants' roof over plaintiff's land and sixteen feet above it was an ouster of plaintiff's possession of his land, or a mere intrusion upon, and interference with, a right incident to his enjoyment of the land.

Blackstone, book 2, page 18, says: "Land hath also, in its legal signification, an indefinite extent upwards as well as downwards"; . . . "the word 'land' includes not only the face of the earth, but everything under it or over it."

Defendants' counsel insists that this action cannot be maintained because there was no intrusion upon the plaintiff's soil, but upon the air or space above it, while plaintiff's counsel claims the rule to be that the action will lie provided the intrusion extends over the line of plaintiff's premises, no matter how slight it is nor how far above the soil.

If the defendants had constructed their barn so that the foundation wall and the building itself had been wholly or in part over the line upon plaintiff's land, there could have been no question as to the plaintiff's right to maintain ejectment. But suppose they had built their foundation wall strictly upon their own land, but close to the line, and had projected the entire side of the building itself a few inches over the line and above the plaintiff's land, could the plaintiff maintain ejectment for the intrusion? If not, it would be because the intrusion was not upon the land itself but the space above it. If he could not maintain ejectment, he would be obliged to submit to the invasion and only have his damages therefor. But the law says the land is his even to the sky, and therefore he has a right to it, and should not be compelled to part with any portion of it upon the mere payment of damages by the trespasser. A case can readily be conceived where the projection of the side of a building, or even of bay windows, by one party over land of another

would be of so great inconvenience and injury to the latter that a judgment for damages would afford no adequate compensation.

But to carry the illustration one step further. One owner of a party or division wall places upon the top thereof a cornice about two and a half inches wide, which projects over the lot of the adjoining owner. Can the latter maintain ejectment? It was held in *Vrooman v. Jackson*, 6 Hun, 326, that he could not. It was also held in *Aiken v. Benedict*, 39 Barb. 400, that where one erects a building upon the line of his premises so that the eaves or gutters project over the land of his neighbor, ejectment would not lie; that an action for a nuisance was the proper remedy, the court in that case dissenting from the doctrine of *Sherry v. Frecking*, 4 Duer, 452.

A similar case to the one last cited is that of *Stedman v. Smith*, 92 Eng. Com. Law, 1. There the plaintiff and defendant occupied adjacent plots of ground, divided by a wall of which they were the owners in common. There was a shed in defendant's ground contiguous to the wall, the roof of which rested on the top of the wall across its whole width. Defendant took the coping stones off the top of the wall, heightened the wall, replaced the coping stones on the top, and built a wash-house contiguous to the wall where the shed had stood, the roof of the wash-house occupying the whole width of the top of the wall; and he let a stone into the wall with an inscription on it stating that the wall and the land on which it stood belonged to him. It was held that on these facts a jury might find an actual ouster by defendant of plaintiff from the possession of the wall, which would constitute a trespass upon which plaintiff might maintain an action against defendant. This case is in point as showing a disseisin of the plaintiff's possession rather than a mere infringement of a right.

In *McCourt v. Eckstein*, 22 Wis. 153, it was held that where some of the stones of defendant's foundation wall projected eight inches over plaintiff's land, the plaintiff might treat this as a disseisin rather than a trespass, and might maintain ejectment.

It clearly is not essential that the intruding object should actually rest upon the plaintiff's soil to entitle him to the action of ejectment, for this action will lie for an upper room in a dwelling-house or other building.

As the law gives the owner of the land all above it within its boundaries, we can find no reason, resting in principle, why, for the projection by one party of a portion of his building over the land of another, as in this case, he may not be liable in ejectment. The plaintiff was disseised of his land, and the defendant was in the

wrongful possession thereof by his projecting roof. *Chamberlin v. Donahue*, 41 Vt. 306. There is no more difficulty in describing in a declaration a projection above the soil than one upon it, nor can there be any difficulty in the sheriff delivering possession to the plaintiff. No question was raised in the court below as to the sufficiency of the declaration.

*The judgment of that court is affirmed.*<sup>1</sup>

## SECTION II.

### *Actions under Modern Codes and Practice Acts.*

[*Rules of the Supreme Court*, 1883 (England), Order I, Rule 1.]

ALL actions which, previously to the commencement of the Principal Act, were commenced by writ in the Superior Courts of Common Law at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Pleas at Durham, and all suits which, previously to the commencement of the Principal Act, were commenced by bill or information in the High Court of Chancery, or by a cause *in rem* or *in personam* in the High Court of Admiralty, or by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding to be called an action.

[*New York Code of Civil Procedure*, Section 3339.]

THERE is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished.

[*Massachusetts Revised Laws*, Chapter 173, Section 1.]

THERE shall be only three divisions of personal actions: —

First, Contract, which shall include actions formerly known as *assumpsit*, covenant and debt, except actions for penalties.

Second, Tort, which shall include actions formerly known as trespass, trespass on the case, trover and actions for penalties.

Third, Replevin.

<sup>1</sup> As to the scope of the action of ejectment, see 1 Chitty, Pleading, 16th Am. ed., \*209. — Ed.

## BARNES v. QUIGLEY.

COURT OF APPEALS OF NEW YORK. 1874.

[Reported 59 *New York*, 265.]

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict, and affirming an order denying a motion for a new trial.

The complaint in this action, in substance, alleged, that on the 3d day of April, 1871, plaintiff was the owner of a promissory note made by defendant, payable to the order of Britton & Co., for \$2,165.86; which was indorsed by the payees and transferred to plaintiff before maturity; that prior to its maturity the payees failed and made an assignment; that on or about the day mentioned, defendant, for the purpose of deceiving plaintiff and inducing him to surrender up the note for a less sum than was due thereon, falsely and fraudulently represented that the note was made by him solely for the accommodation of the payees, he receiving no consideration whatever therefor, and that all moneys paid by him upon the note would be an entire loss, whereas the note was in fact for merchandise sold by the payees to defendant, and that he received full value for the note. That plaintiff relying upon said representations, and being ignorant of the facts, was induced thereby and did accept \$582.70 less than the amount due, and surrendered up the note.

That by reason of the premises said plaintiff has been deceived and defrauded by said defendant out of said sum of \$582.70, and has sustained damage to that amount.

Defendant's answer admitted the allegations of the complaint as to the making, indorsement and transfer of the note, the failure of the payees, and that he paid the sum of \$1,600 in full settlement of the note, which was surrendered up to him. He denied all the other allegations of the complaint. On the trial plaintiff moved for judgment on the pleadings, which motion was granted, and directed a verdict for the balance unpaid on the note, to which defendant's counsel duly excepted.

ALLEN, J. The complaint is for fraud, and not upon contract. Whether the facts stated constitute a cause of action is not material. The whole frame-work is in fraud, and the cause of action, as set forth, is based upon the false and fraudulent representations of the defendant, by which the plaintiff was induced to surrender



and give up to the defendant his promissory note, held and owned by the plaintiff, for an insufficient consideration, an amount considerably less than its face, by reason whereof, as alleged, the "plaintiff has been deceived and defrauded out of said sum of \$582.70, and has sustained damage to that amount."

The theory of the plaintiff at the commencement of the action, and the foundation of his claim as formally made in his complaint, was, that a surrender of the note upon the receipt of an agreed sum, less than the amount actually due in satisfaction for the full sum, was equivalent to a release under seal, and effectually discharged the debt. In that view he could only recover by impeaching the release and discharge, for fraud, and he framed his complaint to meet the case in that form. His whole cause of action rested upon the alleged fraud, and it was an entire change of that cause, and a surprise upon the defendant, when this view was ignored by the counsel and the court at the trial, and a verdict ordered upon a denial in the answer of the only material allegations of the complaint. We are not to speculate upon the question whether the surrender of the note did discharge the obligation. The plaintiff assumed that it did, and brought his action to recover for the fraud by which the discharge was procured. It was error in the court to change the form of the action, by striking out or treating as surplusage the principal allegations — those which characterize and give form to the action — because, perchance, there may be facts stated by way of inducement spelled out, which would, when put in proper form, have sustained an action of assumpsit.

The defendant was called upon to answer the allegations of fraud, and not to resist a claim to recover in assumpsit. The two forms of actions might require very different defences. This is not the case of an obligation or contract fraudulently incurred, in an action upon which the fraudulent acts of the obligor or promisor are averred, which, as they do not enter into the contract, and are not essential to the cause of action, may and should be rejected as surplusage, as in *Graves v. Waite*, 59 N. Y. 156, recently decided by this court. The plaintiff was not, under the complaint, entitled to a verdict and judgment, as in an action upon the note. The defendant, in preparing his answer and putting in his defence, was as unconscious of any necessity of stating and setting up any defence he might have to the note, as the framer of the complaint was innocent of any intent to make a case for a recovery upon the note, as a valid and subsisting obligation. While the Code is

liberal in disregarding technical defects and omissions in pleadings, and in allowing amendments, it does not permit a cause of action to be changed, either because the plaintiff fails to prove the facts necessary to sustain it, or because he has mistaken his remedy, and the force and effect of the allegations of his complaint. Code, § 173; *DeGraw v. Elmore*, 50 N. Y. 1; *Ross v. Mather*, 51 Id. 108; *Elwood v. Gardner*, 45 Id. 349.

The judgment must be reversed and a new trial granted, costs to abide the event.

All concur in result.

*Judgment reversed.*<sup>1</sup>

### KNAPP v. WALKER.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1900.

[Reported 73 *Connecticut*, 459.]

ACTION to recover damages for breach of contract and for fraud in an exchange of horses, brought originally before a justice of the peace and thence, by the defendant's appeal, to the Court of Common Pleas in Fairfield County and tried to the court, Curtis, J.; facts found and judgment rendered for the plaintiff, and appeal by the defendant for alleged errors in the rulings of the court. No error.

The complaint alleged that the defendant owned a gray mare which he represented to be worth \$100, which he offered to exchange for a gray horse owned by plaintiff, of the value of \$100; that by agreement with the defendant, the plaintiff, believing the statements of the defendant to be true, left his gray horse at a certain livery stable, where it was taken by the defendant, but that the defendant failed to leave his gray mare at said place, as had been agreed, but left a bay mare which was of no value and which afterwards died; that plaintiff immediately, when said bay horse was brought to his house by his hired man, notified the defendant that the bay mare was unsatisfactory.

Paragraphs 7 and 8 of the complaint were as follows: "7. The defendant at the time the agreement was made did not have the gray mare in his possession, and did not intend to deliver the same as he had agreed, but falsely and fraudulently represented to the

<sup>1</sup> See *Mescall v. Tully*, 91 Ind. 96; *City of Union City v. Murphy*, 176 Ind. 597. Compare *Wilson v. Haley Live Stock Co.*, 153 U. S. 39, 38 L. ed. 627. — ED.

plaintiff that he had such a gray mare and that he would deliver the same as aforesaid, and thereby induced the plaintiff to part with his said horse. 8. The defendant made said statements knowing them to be false, with intent thereby to make said exchange and defraud him."

The complaint asked for \$100 damages.

The answer denied the material allegations of the complaint.

The court found the facts substantially as alleged in the complaint, excepting that paragraphs 7 and 8 were untrue, and found that the gray mare, which the defendant had promised to deliver to the plaintiff, was at the time of the exchange of the value of \$30.

The defendant claimed that from the averments of the complaint the action was for damages for the alleged fraud of the defendant; and that since the complaint contained but a single count alleging fraud, it could not properly be interpreted as also describing a cause of action upon a contract for which the plaintiff could recover after having failed to prove the fraud alleged. The court overruled said claims and rendered judgment for the plaintiff for \$30.

HALL, J. A cause of action for breach of a contract for the exchange of personal property, and one for fraud in inducing the plaintiff to part with his property by means of false representations, may be united in the same complaint when both causes of action arise "out of the same transaction or transactions connected with the same subject of action." General Statutes, § 878.

Though different rules of damages may be applicable to the two causes of action, yet when a recovery can be had upon but one, and both arise "out of the same transaction or transactions connected with the same subject of action," they may both be stated in one count. *Craft Refrigerating Machine Co. v. Quinnipiac Brewing Co.*, 63 Conn. 551, 562.

The complaint before us, containing but one count, describes a cause of action for fraud. It alleges that the defendant by certain false and fraudulent representations, which are set forth, induced the plaintiff to part with his horse of the value of \$100. It also describes a cause of action for breach of contract. It alleges that the defendant failed to perform his agreement to deliver a certain gray mare in exchange for the horse which he had received from the plaintiff. The dealings between the plaintiff and defendant with reference to an exchange of horses was the transaction out of which both the alleged causes of action arose, and a statement of all the claimed facts of the entire transaction therefore involved a statement of both of said causes of action.

Under our practice the plaintiff had the right to state in one count the entire transaction, and to submit to the court the question whether, upon the facts, he was entitled to recover the value of the horse which he had delivered to the defendant, upon the ground that he had been induced to part with it by the defendant's fraud, or only the value of the horse which the defendant had promised to deliver to him in exchange, upon the ground that his only right of action was for breach of contract.

The court having found that the defendant failed to perform his agreement, but that there was no fraud in the transaction, properly rendered a judgment for damages for breach of contract. *Craft Refrigerating Machine Co. v. Quinnipiac Brewing Co.*, 63 Conn. 551; *Metropolis Mfg. Co. v. Lynch*, 68 Conn. 459, 470.

There is no error.

In this opinion the other judges concurred.

## BRUHEIM v. STRATTON.

SUPREME COURT OF WISCONSIN. 1911.

[Reported 145 *Wisconsin*, 271.]

KERWIN, J.<sup>1</sup> The complaint in this action stated that the plaintiff was the owner of certain lands in Minnesota and that between November, 1903, and March, 1904, the defendant unlawfully and wrongfully entered upon said land and without authority wilfully and wrongfully cut standing live timber growing thereon and wilfully and wrongfully took and carried the same away and converted the same to his own use, to the great injury and damage of the plaintiff, and further alleged the value of said timber converted, and demanded judgment for that amount and also treble said amount as damages under the Minnesota statutes. The complaint also contains allegations setting up the statutes of Minnesota respecting wilful trespass and single and treble damages. The defendant answered admitting that the Minnesota statutes set up in the complaint were in full force and effect in the state of Minnesota as alleged in the complaint, and denied every other allegation of the complaint.

<sup>1</sup> The statement of facts and the dissenting opinion of Barnes, J., are omitted. — Ed.



The court below sustained an objection to any evidence under the complaint for the reason that it was a complaint in trespass upon lands in Minnesota, therefore the court had no jurisdiction of the action, and denied the application of the plaintiff to amend the complaint on the ground that it had no power or jurisdiction to allow such amendment, for the reason that, the cause of action being one in trespass, the complaint could not be amended so as to set up a cause of action for conversion of the timber cut.

We think the court below erred in both particulars. In the first place there were sufficient allegations in the complaint to make a good cause of action in conversion, and what the idea of the pleader was when he drew the complaint was immaterial. If the allegations were sufficient to constitute a cause of action in conversion the plaintiff was entitled to have it treated as such by the court, and the fact that the court had no jurisdiction of the action of trespass upon the land in another state rendered the allegations respecting a cause of action in trespass merely surplusage, and, there being sufficient allegations aside from these to make the complaint one in conversion, it should have been so treated by the court. *Swift v. James*, 50 Wis. 540, 7 N. W. 656; *Bieri v. Fonger*, 139 Wis. 150, 120 N. W. 862; *Morse v. Gilman*, 16 Wis. 504; *Manning v. School Dist.*, 124 Wis. 84, 102 N. W. 356; *Francy v. Warner*, 96 Wis. 222, 71 N. W. 81; *Emerson v. Nash*, 124 Wis. 369, 102 N. W. 921. Doubtless the complaint as originally drawn would have been subject to a motion to make more definite and certain or to strike out the surplus allegations, but no such motion was made and defendant answered on the merits. *Hagenah v. Geffert*, 73 Wis. 636, 41 N. W. 967; *Phillips v. Carver*, 99 Wis. 561, 75 N. W. 432.

Respondent relies upon *Joseph Dessert L. Co. v. Wadleigh*, 103 Wis. 318, 79 N. W. 237. It will be observed, however, that was an action brought for trespass upon land in Wisconsin, which action the court had jurisdiction of. Moreover the strict rule laid down there has not been followed by this court. In *Bieri v. Fonger*, *supra*, the court said (page 155):

"In the light of the very liberal rules for testing the sufficiency of pleadings and proceedings which have been declared in recent years and the progressive tendency to broaden the judicial vision as to the scope of sec. 2829, Stats. (1898), aforesaid, the criticism in *Joseph Dessert L. Co. v. Wadleigh*, *supra*, would hardly be made today. The general spirit of the decision as regards essentiality of technical accuracy in pleadings and necessity for a party to stand or fall, under all circumstances, by the particular cause of action he intended to plead, is not in strict harmony with the later-day expressions and decisions."

It was also within the power of the court to allow the amendment which plaintiff asked, setting out the conversion more definitely. The cause of action set up in the complaint was a tort action, whether for trespass or conversion, and the power of the court to change from a cause of action in trespass to one in conversion, we think is clear. It follows that the court erred in sustaining the objection to any evidence under the complaint and also in refusing the amendment.

*By the Court.* — The judgment below is reversed, and the cause remanded for further proceedings according to law.<sup>1</sup>

## RAYMOND SYNDICATE v. GUTTENTAG.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1901.

[Reported 177 *Massachusetts*, 562.]

TORT against a constable for the alleged conversion of sixty-six chairs, a desk, an office chair and other articles belonging to the plaintiff. Writ dated August 3, 1895.

The case was brought in the Municipal Court of the city of Boston, and came on appeal to the Superior Court, where it was tried before Hopkins, J., without a jury. It appeared that the property in question, at the time of the alleged conversion on August 1, 1895, was owned by the plaintiff, and was in the possession of one Wyman, doing business under the firm name of "The Original Wyman Sandwich Company" on Washington Street in Boston, under a contract between Wyman and the plaintiff made some time in July, 1895, by which Wyman was to retain possession of the property and use it in his business of restaurant keeper for a period of

<sup>1</sup> In *Cockrell v. Henderson*, 81 Kan. 335, 105 Pac. 443, the Court said: "Much space is occupied in the briefs in the discussion of the question whether the plaintiff's action was based upon fraud and deceit or upon contract. Some controversy also arose between the trial court and the plaintiff's attorney on this question, and the court indicated that the plaintiff should elect upon which theory he would try the case, and upon the refusal of the attorney verbally to elect and upon his statement that he relied only upon his petition the court said that the plaintiff's attorney had already indicated that he relied upon contract. This discussion and controversy seem quite irrelevant, the only proper consideration being whether the petition states facts constituting a cause of action and whether the evidence was sufficient to justify the submission of the case to the consideration of the jury." Compare *Hyams v. Stuart King*, [1908] 2 K. B. 696. — ED.

ninety days, and at the expiration of that period was either to purchase the property or return it to the plaintiff. On August 1, 1895, while Wyman was in possession of the property under this contract, the property was attached by the defendant on a writ issued from the Municipal Court of the city of Boston in favor of certain Fonseca Brothers against Wyman, was removed to a public storehouse and subsequently was sold by the defendant at public auction on an execution in the last named action. . . .

At the close of the evidence, the defendant requested the judge to rule, that the plaintiff could not recover upon the evidence, and that upon the evidence the plaintiff was not entitled to the possession of the goods and consequently could not maintain this action.

The judge refused to give either ruling, and found for the plaintiff in the sum of \$215. The defendant alleged exceptions.

BARKER, J.<sup>1</sup> The declaration alleges "that the defendant has converted to his own use the property of the plaintiff." The bill of exceptions purports to state the facts of the case, and that the defendant requested rulings that the plaintiff could not recover upon the evidence, and that upon the evidence the plaintiff was not entitled to the possession of the goods and consequently could not maintain the action. Both briefs are addressed to the question whether upon the facts stated the action would lie upon the declaration, and we therefore consider that question.

The declaration follows a statutory form first given in St. 1851, c. 233, and which is also found in St. 1852, c. 312, Gen. Sts. c. 129, and Pub. Sts. c. 167. None of these statutes abolished the action of trover. Each of them enacted that there should be only three divisions of personal actions, one of which divisions, actions of tort, has always included the action of trover by that name, the two first statutes designating it as the action "now known as" trover, and the two last as the action "heretofore known as" trover. St. 1851, c. 233, § 1. St. 1852, c. 312, § 1. Gen. Sts. c. 129, § 1. Pub. Sts. c. 167, § 1.

Under the old practice the owner of chattels could not maintain trover for their conversion unless when the acts complained of were done he had possession or the right to immediate possession. *Fairbank v. Phelps*, 22 Pick. 535, and cases cited. The owner's remedy for damage to his reversionary interest in chattels, done when he had neither possession nor the right to immediate possession, was

<sup>1</sup> A part of the statement of facts and a part of the opinion are omitted. — Ed.

an action on the case. *Ayer v. Bartlett*, 9 Pick. 156. *Forbes v. Parker*, 16 Pick. 462. After the adoption of the practice acts it was held that they made no change in the rules of evidence applicable to the causes of action comprehended under the designation of actions of tort, and that it was still necessary under the statutory form given for trover that the evidence should be such as would have proved a conversion in an action of trover at common law. *Robinson v. Austin*, 2 Gray, 564. *Winship v. Neale*, 10 Gray, 382.

It is settled that to maintain tort under a declaration like the present one the plaintiff must show possession or the right to immediate possession. *Winship v. Neale*, 10 Gray, 382. *Landon v. Emmons*, 97 Mass. 37. *Ring v. Neale*, 114 Mass. 111. *Clapp v. Campbell*, 124 Mass. 50. *Baker v. Seavey*, 163 Mass. 522, 526. *Field v. Early*, 167 Mass. 449, 451. The ground of action of one not in possession or having the right to immediate possession should be set forth in a different form. *Baker v. Seavey*, *ubi supra*.

The facts stated show that when the plaintiff's chattels were attached by the defendant, the plaintiff had neither possession nor the right to possession. There is nothing to show that the attachment of the goods worked a forfeiture of Wyman's right to retain and use them under his contract with the plaintiff, or gave the latter a right to retake them. See *Ayer v. Bartlett*, 9 Pick. 156, 160. Therefore the plaintiff could not recover in the action upon the facts, and the jury should have been instructed to that effect, in accordance with the defendant's requests. . . .

*Exceptions sustained.*

## WILSON and Another v. RYBOLT.

SUPREME COURT OF INDIANA. 1861.

[Reported 17 *Indiana*, 391.]

PERKINS, J.<sup>1</sup> Suit before a justice of the peace to recover possession of personal property, viz., a certain title deed to a lot of ground. Judgment for the plaintiff, on appeal to the Common Pleas. The first question is, whether a title deed can be recovered in this form of action.

<sup>1</sup> A part of the opinion and the dissenting opinion of Hanna, J., are omitted.  
— Ed.



A title deed is a personal chattel; but like the log chain of a saw mill, or certain other fixtures, it is so connected with, and essential to, the ownership of real estate, that it descends with it to the heir. Blackstone's Comm., Book 2, p. 427; *Hoskins v. Tarrence*, 5 Blackf. 417.

From a very early period chancery compelled the delivery of title deeds where necessary. Blackstone's Comm., Shar.'s Ed., Book 3, p. 153, note. Later they became recoverable in an action of detinue. Chitty, in his work on Pleadings (vol. 1, p. 122), says, detinue "lies for the recovery of charters and title deeds," &c. See *Atkinson v. Baker*, 4 Term Rep. 430.

Now, what was the action of detinue? Blackstone, in his Commentaries (Book 3, p. 151), thus describes its incidents: "In order, therefore, to ground an action of detinue, which is only for the *detaining*, these points are necessary. 1. That the defendant came lawfully into possession of the goods, as either by delivery to him, or finding them. 2. That the plaintiff have a property. 3. That the goods themselves be of some value; and, 4. That they be ascertained in point of identity. Upon this the jury, if they find for the plaintiff, assess the several values of the parcels detained, and also damages for the detention; and the judgment is conditional; that the plaintiff recover the said goods, or (if they cannot be had), their respective values, and also the damages for detaining them."

Such was the common law action of detinue; and as it was an action for the recovery of personal property only, we must hold that whatever could be recovered by it was regarded, for the purposes of this civil remedy, as personal property. The action of replevin, at common law, was originally of a more limited character. It lay to recover back property illegally distrained; but it afterward came into use in all cases where personal property was illegally taken. The two actions of detinue, for unlawful detentions, and replevin for unlawful takings, thus came to cover the whole ground of unlawful deprivations of personal property, so far as recovering the specific articles was concerned. 1 Chit. Pl. 162, 164.

These two actions, viz., detinue, and replevin, in their fullest scope, were formerly in use in this State. Ind. Dig., p. 46, *et seq.*; see Will. on Per. Prop., top p. 49. And it will be seen at a glance, by inspecting the provision in the code for the recovery of personal property, that it covers the entire ground of both actions. That provision is (§ 128), "when any personal goods are wrongfully

taken, or unlawfully detained," &c. The jurisdiction of justices of the peace, as to the character of articles of property, is equally extensive. 2 R. S., § 71, p. 464.

The conclusion irresistibly follows, that the possession of title deeds may be recovered in the action under the code for the recovery of personal chattels. . . .

*Per Curiam.* — The judgment is affirmed with costs.<sup>1</sup>

<sup>1</sup> For a comparison of the common law and code actions for the recovery of personal property, see *Ames v. Mississippi Broom Co.*, 8 Minn. 467.

As to the necessity of possession by the defendant at the time the action is brought under code provisions as to claim and delivery of personal property, see *Nichols v. Michael*, 23 N. Y. 264, 80 Am. Dec. 259; *Sinnott v. Flejock*, 165 N. Y. 444, 59 N. E. 265, 53 L. R. A. 565, 80 Am. St. Rep. 736; *Willis v. DeWitt*, 3 S. D. 281, 52 N. W. 1090; *Kierbow v. Young*, 20 S. D. 414, 107 N. W. 371, 8 L. R. A. (N. S.), 216, 11 Ann. Cas. 1148; *Andrews v. Hoesich*, 47 Wash. 220, 91 Pac. 772, 18 L. R. A. (N. S.), 1065. — ED.

## CHAPTER V.

### PARTIES.

#### SECTION I.

*Right to Sue and Liability to be Sued.*

PEARSON *v.* NESBIT.

SUPREME COURT OF NORTH CAROLINA. 1827.

[Reported 1 *Devereux*, 315.]

RICHMOND Pearson appointed the present Plaintiff, and Jesse A. Pearson, executor and executrix of his will. At the time of his death, he was indebted to Alexander Nesbit & Company, which consisted of the present Defendant, and the same Jesse A. Pearson, whom he had appointed one of his executors.

A writ issued in the name of "A. Nesbit & Co.," Plaintiffs, against "Jesse A. Pearson and Elizabeth Pearson, executor and executrix of Richmond Pearson," Defendants, returnable to the Fall Term of 1820, of Rowan Superior Court, when judgment was confessed thereon by the Defendants. Execution issued on this judgment, and was continued until the Spring Term of 1823, when a return of *Nulla bona testatoris* was made. After the confession of the judgment (the case did not state when) Jesse A. Pearson died. A *scire facias* on the judgment issued at the instance of Nesbit, as surviving partner, to subject the present Plaintiff *de bonis propriis*.

At the Fall Term of 1827, the present Plaintiff, one of the original Defendants, filed an affidavit, stating that Jesse A. Pearson was both Plaintiff and Defendant in the first action; that she never had received any of the assets of Richmond Pearson, and moved, 1st, for a writ of error *coram nobis*; and if the matter assigned was not error, then 2dly, to set aside the judgment confessed by her and Jesse A. Pearson. The defendant pleaded, 1st, *In nullo est erratum*. 2dly, that if there was error, it was waived by the confession of the judgment.

On the last Circuit, before his honor, Judge STRANGE, an order in the alternative was made, whereby the judgment was reversed for error, if error, *coram nobis*, was proper; but, if not, then the judgment was vacated. Upon which, Nesbit appealed.

HENDERSON, J. A suit at law, is a contest between two parties in a Court of Justice; the one seeking, and the other withholding the thing in contest. The same individual cannot be, at the same time, both the person seeking and the person withholding. For it involves an absurdity, that a person should seek *from* himself, or withhold *from* himself. Between a corporation and the individuals composing it, this identity does not exist, and the absurdity above stated is avoided; but where the same person is both Plaintiff and Defendant in different rights, as for himself on the one side, and as executor on the other, this absurdity is involved. When adversary rights, as creditor and executor, or debtor and executor, meet in the same individual, the law considers the contest as settled — at least as long as the union exists. As soon therefore, as it appears to the Court, that the same individual is both Plaintiff and Defendant, any judgment entered up in the cause is, to say the least, erroneous, and should be reversed.

I am not prepared to say, whether a writ of error, or a motion to vacate, is the most proper mode of proceeding in this case; but I am satisfied, that a writ of error is a proper remedy, although it may not be the only proper one.

The judgment of the Superior Court, reversing the original judgment, must be affirmed.

PER CURIAM.

*Judgment of reversal affirmed.*<sup>1</sup>

## MASON v. INTERCOLONIAL RAILWAY OF CANADA & Trustees.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1908.

[Reported 197 *Massachusetts*, 349.]

KNOWLTON, C. J.<sup>2</sup> This is an action brought by a trustee process to recover damages for personal injuries. The defendant has not appeared, but a member of our bar, as a friend of the court, following the practice approved by Chief Justice Marshall in *Osborn v.*

<sup>1</sup> *McElhanon v. McElhanon*, 63 Ill. 457; *Eastman v. Wright*, 6 Pick. (Mass.), 316; *Pierce v. Boston Five Cents Savings Bank*, 125 Mass. 593; *Taylor v. Thompson*, 176 N. Y. 168, 68 N. E. 240; *Newsom v. Newsom*, 4 Ired. Law (N. C.), 381; *Perkins v. Se Ipsam*, 11 R. I. 270; *Sweetland v. Porter*, 43 W. Va. 189, 27 S. E. 352, *accord*. See Dicey, Parties, p. 65.

As to the relief given by equity and under the codes of procedure, see *Crosby v. Timolat*, 50 Minn. 171, 52 N. W. 526; *Cole v. Reynolds*, 18 N. Y. 74. Compare *Ellis v. Kerr*, [1910] 1 Ch. 529. — Ed.

<sup>2</sup> The statement of facts and a part of the opinion are omitted. — Ed.



United States Bank, 9 Wheat. 738, 870, has brought before the court a suggestion that the action be dismissed, and also an affidavit of the deputy of the Minister of Justice and Attorney General of Canada, including a copy of the "Act respecting Government Railways," from which it appears that the so called defendant, the Intercolonial Railway of Canada, is the property of His Majesty, Edward VII., King of the United Kingdom of Great Britain and Ireland, in the right of his Dominion of Canada, and is not a corporation. The truth of the matters thus shown to the court is not questioned. It appears that no subject, private individual or corporation has any interest or concern by way of property or direction in the ownership or working of the Intercolonial Railway, but that it is owned and operated by the king, through his government of Canada, for the public purposes of Canada. All income arising from the operation of it is, by the laws of Canada, appropriated to the consolidated revenue fund of Canada, upon which fund all the expenses of the government of Canada are chargeable. All moneys and income due by reason of the operation or business of the railway are chargeable as belonging to the King, and are collectible in his name. Such moneys, when collected, are deposited to the credit of the minister of finance and register general of Canada, and carried to the credit of the consolidated revenue fund, which fund is appropriated to the public debt and service of Canada. The cost of maintenance and operation of this railway is provided for by appropriation of the parliament of Canada out of the consolidated revenue fund, and all the receipts from the working of the railway are a part of the moneys of Canada, appropriated to the consolidated revenue fund, and are not used for the maintenance or operation of the railway, except as the receipts from customs or excise duties or from any other branch of the public service are so used. See also *The Queen v. McLeod*, 8 Canada Supreme Court, 1, 23.

Upon this suggestion the question at once arises whether the court has jurisdiction of a suit which is virtually against the king of a foreign country. An answer in the negative comes almost as quickly.<sup>1</sup> . . .

<sup>1</sup> The learned chief justice then discussed the following cases: *Briggs v. Lightboats*, 11 Allen (Mass.), 157; *Schooner Exchange v. M'Faddon*, 7 Cranch, 116; *Wadsworth v. Queen of Spain*, 17 Q. B. 171; *De Haber v. Queen of Portugal*, 17 Q. B. 171, 196; *The Constitution*, L. R. 4 P. D. 39; *The Parlement Belge*, L. R. 5 P. D. 197; *Vavasseur v. Krupp*, 9 Ch. D. 351; *Young v. The Scotin*, [1903] A. C. 501; *The Jassy*, 75 L. J. P. D. and A. 93. — Ed.

The principles which have long been recognized as applicable to the dealings of all nations with one another, as well as the formal decisions of the courts, make it plain that this action must be dismissed for want of jurisdiction. The plaintiff must seek her remedy in the courts of the country in which she received her injury, where there is a statutory provision for such cases.

*Action dismissed.*<sup>1</sup>

STEAMBOAT PEMBINAW and Owner v. WILSON.

SUPREME COURT OF IOWA. 1861.

[Reported 11 Iowa, 479.]

BALDWIN, J. The note sued on was given by the defendant to the "S. B. Pembinau and owners," and the suit was brought in the name of the Steamboat Pembinau and owners, without any allegation in the petition that plaintiff was a partnership or corporation doing business under that name and style. The defendant moved to dismiss the cause in the District Court, for the reasons that the petition showed that there was no party plaintiff to the suit, and for other like causes. This motion was overruled and judgment for plaintiff was rendered for the amount due on the note.

There is a special provision of our statute under which suits may be brought against boats by their name when a lien is sought to be enforced; but there is no special authority given under which a boat or the owners thereof may sue in the name of such boat. Civil actions are required to be brought in the names of the real parties

<sup>1</sup> See also *Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149; *Statham v. Statham and the Gaekwar of Baroda*, [1912] P. 92; *Chisholm v. Georgia*, 2 Dall. (U. S.), 419, 1 L. ed. 440; *Hans v. Louisiana*, 134 U. S. 1, 33 L. ed. 842; *Porto Rico v. Ramos*, 232 U. S. 627, — L. ed. —, 34 S. Ct. 461; *Wilson v. Louisiana Purchase Exposition Commission*, 133 Ia. 586, 110 N. W. 1045; *Dicey, Parties*, p. 4; *Foster, Federal Practice*, 5th ed., secs. 94-105.

As to liability of the representatives of foreign sovereigns, see *Magdalena Steam Navigation Co. v. Martin*, 2 El. & El. 94. As to consuls, see *Börs v. Preston*, 111 U. S. 252, 28 L. ed. 419; *Miller v. Van Loben Sels*, 66 Cal. 341, 5 Pac. 512; *Wilcox v. Luco*, 118 Cal. 639, 45 Pac. 676, 50 Pac. 758.

A sovereign cannot be sued in his own courts without his consent. *Young v. The Scotia*, [1903] A. C. 501; *Kansas v. United States*, 204 U. S. 331, 51 L. ed. 510, 27 S. Ct. 388.

As to the rights of a sovereign as plaintiff, see *King of Spain v. Hullet*, 1 Cl. & F. 333; *State v. Ohio Oil Co.*, 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627; *King v. Knepper*, 22 Mo. 550; *Republic of Honduras v. Soto*, 112 N. Y. 310, 19 N. E. 845. — Ed.

in interest. Section 1676, Code of 1851. "Pembinaw & Owners" is not alleged to be a corporation or partnership, and is not a party within the meaning of this section. It is probable however that the District Court based the right of plaintiff to sue, in this capacity, upon the provisions of section 1692 of the Code, which says, that where an action is founded upon a written instrument, suit may be brought by or against any of the parties thereto, by the same name and description as those by which they are designated in such instrument. We cannot think that the legislature intended by the enactment of this section to provide that a suit could be brought in name of a steamboat, hotel, toll-gate or race-horse, although each may have a name and may be made the payee of a note. Suits must be brought in the name of the real parties in interest; and "names," as here used, does not refer to something inanimate, or having no legal existence but to something that can sue or be sued, as persons or corporations, and that, as such, can have an interest in a suit.

*Judgment reversed.*<sup>1</sup>

ST. PAUL TYPOTHETÆ and Another *v.* ST. PAUL BOOK-BINDERS' UNION NO. 37 and Others.

SUPREME COURT OF MINNESOTA. 1905.

[Reported 94 *Minnesota*, 351.]

BROWN, J.<sup>2</sup> This action was brought by the St. Paul Typothetæ, an unincorporated association of persons, firms, and corporations engaged in the business of printing and bookbinding, and the West Publishing Company, a corporation and member of the association, against the St. Paul Bookbinders' Union No. 37, an unincorporated association of printers and bookbinders, and the members thereof, to recover damages for an alleged breach of contract. Separate demurrers were interposed to the complaint, one by the Bookbinders' Union, and one by the individual members thereof, the grounds of which are (1) that plaintiff St. Paul Typothetæ has no legal capacity to sue, and (2) that the complaint does not state facts sufficient to constitute a cause of action against the union in favor either of the Typothetæ or the West Publishing Company. The demurrer as to the West Publishing Company was sustained, but overruled as to the Typothetæ. Both parties appealed.

<sup>1</sup> Compare *Western & A. R. R. Co. v. Dalton Marble Works*, 122 Ga. 774, 50 S. E. 978. — Ed.

<sup>2</sup> A part of the opinion is omitted. — Ed.

The complaint alleges that the persons, firms, and corporations named therein, twenty-five in number, are associated together and doing business in St. Paul under the name and title of "St. Paul Typothetæ"; that each of the said persons, firms, and corporations were at all times named therein engaged in publishing and book-binding, and employers of such printers as were necessary to carry on and conduct their several enterprises; that the object in the formation of the Typothetæ was the protection and promotion of the interests of its several members, correcting abuses, promoting concerted action, reconciling differences, and adjusting controversies between employer and employee, and particularly in securing definite, stable, and harmonious relations between the various members of the association and their respective employees. It further alleges that defendant St. Paul Bookbinders' Union No. 37, is an unincorporated association composed of the persons named therein, the object and purpose of which is the advancement and protection of the mutual and individual interests of all its members in the matter of employment, labor, and wages, and especially the regulation of the relations between employer and employee in the bookbinding trade. It further alleges that on November 21, 1903, plaintiff St. Paul Typothetæ and defendant Bookbinders' Union, for a valuable consideration, by and through their officers entered into a certain contract, a copy of which is attached to and made a part of the complaint.

It is unnecessary here to set out the contract in full. It provides generally the terms of employment between the firms and corporations forming the Typothetæ, and the members of the union; classifying employees, and fixing their compensation in accordance with the nature of the work of each, and specifying generally the terms and conditions of employment. It specially provides that during the life of the contract no strike or lockout shall occur, and that any differences which may arise as to the construction of the contract shall be settled by arbitration, providing the parties do not reach an amicable agreement. The complaint alleges a breach of this contract on the part of the union and its members; that the members of the union in the employ of the West Publishing Company, a party plaintiff and member of the Typothetæ, went out on a strike without cause or provocation, and without a submission of their grievance to arbitration, to the great damage of that company. The complaint further alleges that at the time the contract was entered into it was well known, understood, and agreed by all the parties that said association, St. Paul Typothetæ, was not an



employer of labor, and did not intend to employ any labor or workmen whatsoever, and that each and all the provisions, covenants, conditions, and agreements in said contract to be performed and kept by the union and its members were made for the benefit of each and all the members of the Typothetæ who were then employing, or should thereafter during the life of the contract employ, workmen.

The only questions necessary to be considered on this appeal are (1) whether the Typothetæ has legal capacity to sue, and (2) whether the complaint states a cause of action against the Bookbinders' Union. Whether the complaint states a cause of action in favor of the West Publishing Company against the individual members of the union is not presented by the demurrer. And whether it states a cause of action in favor of that company against the union, as an organization, is determined by the further question whether the union may be sued in its association name.

The Typothetæ and Bookbinders' Union, so far as their legal status is concerned, occupy the same position. Both are unincorporated voluntary associations, and the principles of law applicable generally to unincorporated clubs and societies apply to each. The position such organizations occupy under the law is a question upon which the courts are not fully agreed. It is generally acknowledged that they are *sui generis*, but the courts have had difficulty in agreeing upon the legal principles to apply to them. Many cases hold that in some of their relations they are to be regarded as copartnerships, and governed by the general laws applicable to that relation, and that in other respects the law of corporations applies to their affairs. The distinction in this respect is made (1) as to cases involving rights between the association and third parties dealing with it, and (2) as to cases involving controversies between the members respecting the property owned by the association. Niblack, Ben. Soc. 221. Such organizations are properly divided into two classes, viz., those organized for the purpose of conducting some business enterprise, and those whose purpose is solely the promotion of the interests and welfare of their members, unaccompanied by any business functions. As to this class, it would seem that the law of principal and agent should apply. *Ehrmanntraut v. Robinson*, 52 Minn. 333, 54 N. W. 188.

Both the Typothetæ and the Union come within this class. The Typothetæ is not a business association within the proper meaning of the term; it is not engaged in employing labor, or entering into trade contracts on its own behalf. Its exclusive occupation, as

disclosed by the complaint, is that of promoting and protecting the persons, firms, and corporations composing it in controversies with their employees, and, as their representative or agent, entering into on their behalf contracts with such employees. So far as the complaint discloses, it has no capital stock and no property. The union is an association of employees or workmen organized for similar purposes; it has no capital stock or property; its members do not work under its authority or in its behalf, but for themselves.

But whatever may be the law applicable to such associations generally, there is one respect in which the authorities are agreed, and that is that at common law they are not, whether organized for business or other purposes, entitled to recognition in the courts in their association name. It is well settled that, in the absence of a statute otherwise providing, to be entitled to conduct judicial proceedings in court, a party litigant must be either a natural or artificial person. The rule is correctly stated in 22 Enc. Pl. & Pr. 230, where, in speaking of unincorporated societies, such as those here involved, it is said that such societies cannot maintain an action in their association name, but must sue in the name of the individuals composing them, however numerous they may be. Such societies, in the absence of statutes recognizing them, have no legal entity distinct from that of their members. The rule is followed by an unbroken line of authorities, though a different rule has been applied in many of the courts in actions purely of an equitable nature. On the question generally, see Niblack, Ben. Soc. 183; *Richardson v. Smith*, 21 Fla. 336; *Mexican v. Yellow Jack*, 4 Nev. 40; *Detroit v. Detroit*, 44 Mich. 313, 6 N. W. 675; *Danbury v. Bean*, 54 N. H. 524; *Mayer v. Journeymen*, 47 N. J. Eq. 519, 20 Atl. 492; *Nightingale v. Barney*, 4 G. Greene (Iowa), 106; *Barbour v. Albany Lodge*, 73 Ga. 474; *Steamboat Pembina v. Wilson*, 11 Iowa, 479.

The rule has been changed and modified in many of the states by statutory enactments permitting such associations to sue and be sued in their adopted name. It is claimed in the case at bar that section 5177, G. S. 1894, has changed and modified it in this state. Such is not our understanding of the statute. It provides that when two or more persons associate in any business, transacting that business under a common name, whether it includes the names of such persons or not, the association may be sued by its common name. The statute has been considered in several cases, but in no case to which our attention has been called has it been held that such an association may bring suit in the name in which

it carries on its business. The statute does not provide that actions may be brought in the name of the association, but only that actions may be brought against it. It was construed in *Dimond v. Minnesota Savings Bank*, 70 Minn. 298, 300, 73 N. W. 182, where it was said that it was enacted in the interests of creditors, to enable them to sue copartners or associations by the name under which they transact business, and thus avoid the difficulty of obtaining the names of all the persons forming the associations. "The statute was intended to enlarge, not to restrict, the common law in regard to suits against copartners. It does not permit partners or associates to bring an action in their common name, for they have the means of knowing who the associates are."

This interpretation of the statute is in strict accordance with its evident purpose. The common-law rule that the parties to an action must be either natural or artificial persons has been modified in this state, therefore, only as respects actions against unincorporated associations. An examination of the authorities discloses that in many of the states authority is expressly granted in such cases to sue and be sued, but such is not the statute in this state. The *Typhothetæ* comes within the rule, and it is clear that it has no legal capacity to sue.

The rule applies equally to defendant Bookbinders' Union. That is an unincorporated association similar to the *Typhothetæ*, and cannot be sued in its common name. Many of the cases above cited were actions against such associations, in which the rule of the common law was applied. See also 22 Enc. Pl. & Pr. 242, where it is said that an unincorporated society or association, being considered at common law a copartnership, cannot, in the absence of statute, be sued in its society or association name; but all the members must be made parties, since such associations have, in the absence of statutory recognition, no legal entity apart from their members. This rule applies to the union, unless it comes within the scope of the statute providing for actions against persons doing business under a common name. The statute, it is clear, was not intended to include associations of this character. Its purpose was to authorize the courts to take jurisdiction over unincorporated associations engaged under a common name in some sort of business in which property is bought and sold, debts contracted — concerns owning and holding property, and incurring pecuniary liability — and not associations of the character of labor unions, having no property, engaged in no business occupation, in a proper sense of the term, and whose only function is the promotion of the



interests and welfare of the persons who are members thereof. Such an association is not a copartnership, and the members thereof are liable, if at all, on the contracts of the association on the law of principal and agent. *Ehrmanntraut v. Robinson*, 52 Minn. 335, 54 N. W. 188. It is not a copartnership, because the association is engaged in no business enterprise. . . .

We have been cited to no case where the court has entertained an action of this kind against an association in its common name, where the point has been raised, and our research has disclosed but one, the *Taff Vale* case, which arose in England in 1901. *Taff Vale v. Amalgamated*, L. R. App. Cas. 1901, 426. It was there held that an association of employees, similar to that of the Bookbinders' Union, might be sued in its common name. But the decision was placed squarely upon the ground that such associations are expressly recognized and their organization provided for by act of parliament, and, though the act authorizing their organization did not expressly provide that they might sue or be sued, the court held that the right arose by necessary implication from the fact of legislative recognition and the provision of the law empowering the association to own and hold property. Many cases have been found where injunctions have been issued restraining labor unions, their officers and members, from threatened violations of the law, but cases of that nature are not in point.

It follows that the *Typothetæ* has no legal capacity to sue, and cannot maintain the action; that the Bookbinders' Union cannot be sued in its association name, and neither the *Typothetæ* nor the West Publishing Company can maintain the action against it. Whether, within the rule announced by this court in *Ehrmanntraut v. Robinson*, *supra*, on the law of principal and agent, a cause of action is stated in favor of the West Publishing Company against the individual members of the union, is not presented, and we do not determine it. The demurrer interposed by the individual members of the union does not raise the question, and we leave it for future consideration, should it ever arise.

The order of the court below overruling the demurrer as to the *Typothetæ* is reversed; that sustaining the demurrer as to the West Publishing Company against the union, as such, is affirmed.<sup>1</sup>

<sup>1</sup> See *Karges Furniture Co. v. Amalgamated, etc., Union*, 165 Ind. 421; 75 N. E. 877, 2 L. R. A. (n. s.), 788, 6 Ann. Cas. 829; *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (n. s.), 1067, 7 Ann. Cas. 638; *Saunders v. Adams Express Co.*, 71 N. J. L. 270, 57 Atl. 899; s.c. 71 N. J. L. 520, 58 Atl. 1101; *Dicey, Parties*, p. 266. But see *Taff Vale Railway v. Amalgamated*



## SECTION II.

*Joinder of Parties.*

## A. Plaintiffs.

STARRETT *v.* GAULT *et al.*

SUPREME COURT OF ILLINOIS. 1897.

[Reported 165 *Illinois*, 99.]

CARTWRIGHT, J. Appellees sued appellant for professional services rendered and costs advanced by them as her attorneys. She pleaded the general issue and set-off, and there was a trial resulting in a judgment for appellees for \$1500 and costs. That judgment the Appellate Court affirmed.

One of the defenses at the trial was, that there was a misjoinder of plaintiffs, and that their employment as attorneys was several, and not joint. Plaintiffs proved that upon the death of defendant's husband she employed the plaintiff Thomas H. Gault as her attorney, and at his request she also employed the plaintiff J. McKenzie Cleland a few days later to assist Gault. The services in question were rendered in the administration of her husband's estate in the probate court, and in litigation in other courts concerning her personal interests. Plaintiffs were not partners and had no business relations. Cleland was a partner with another attorney, and the offices of that firm were connected with the office occupied by Gault. In performing the services for defendant they sometimes acted separately and sometimes both took part. She had two other attorneys, who acted for her in some of the suits and assisted in litigation with one or both of the plaintiffs. Moneys were advanced from time to time by the plaintiffs, separately, out of their own individual means. There was no joint fund held or used for such advances nor was there any community of interest in the money advanced. She paid, at different times, different sums of money to each of them, for which separate individual receipts were given. The jury returned a general verdict for plaintiffs, assessing their damages at \$1500, and also the following special findings:

*Society of Railway Servants*, [1901] A. C. 426; *Russell & Sons v. Stampers, etc.*, *Union*, 57 Misc. (N. Y.), 96, 107 N. Y. Supp. 303; *Schwarz v. International Ladies' Garment Workers' Union*, 68 Misc. (N. Y.), 528, 124 N. Y. Supp. 968.

On the question of waiver, see *Spaulding Manufacturing Co. v. Godbold*, 92 Ark. 63, 121 S. W. 1063, 29 L. R. A. (n. s.), 282, 19 Ann. Cas. 947. — Ed.

1. "Was the plaintiff Gault individually employed by the defendant, generally and specially, for all the professional services in the management of the business affairs of the defendant which have been presented in this case as having been performed by both the plaintiffs, and did he render his services in such matters under such original employment? — A. Yes.

2. "Was the plaintiff Cleland expressly or impliedly employed, by a subsequent and distinct agreement, to assist in the performance of the professional services aforesaid, and if so, was he employed by the defendant or by the plaintiff Gault? — A. Yes; by the defendant."

The defendant thereupon moved the court that judgment be entered in her favor upon the special findings, but the motion was denied, and the court, after overruling a motion for a new trial, entered judgment on the general verdict.

If the conclusion of law from the special findings is that the damages sued for resulted from a breach of contracts made with the plaintiffs severally, and not a joint contract with both, then the defendant's motion should have been sustained. A contract with plaintiffs jointly is a different thing from two contracts with them severally. The general verdict was a finding that the alleged joint contract had been proved, and special findings that there was not such contract would be irreconcilably inconsistent with such general verdict. Neither of the plaintiffs would have any right to sue on a contract in which he had no legal interest, and it would make no difference that one or the other of them had a legal right as to each of the different charges or advances, so that in combination their rights would cover all. If plaintiffs sue as joint contractors they must show a joint interest in the contract. *Snell v. DeLand*, 43 Ill. 323. In that case it was further said (p. 326): "It is a rule as old as the science of pleading itself, that in declaring in actions on contracts there must not be too few or too many plaintiffs. If there be, it is fatal to a recovery." Nor is this defense of a merely technical character. Proof of several contracts with the plaintiffs would not support the allegations of the declaration, and the rights and obligations of the parties would be different.

According to the first special finding the contract with Gault was made with him individually, for all the professional services proved, and he rendered his services under that contract. Cleland had no interest whatever in that contract by its terms, and it is not claimed that he gained any by virtue of any partnership or relation with Gault. He had no interest in or relation to the undertaking of

Gault to render his services for defendant. From the second special finding it results that the plaintiff Cleland was subsequently employed by a separate contract with defendant to assist in the performance of the professional services rendered, and Gault was not in any manner concerned in that contract. It gave Cleland no interest in Gault's contract made a few days before. Neither would be affected by the failure of the other to perform his contract nor by the manner or degree of skill with which he might perform it. The fact that Cleland was hired to assist Gault would not give either any interest in the contract of the other. It would scarcely be claimed that the employees of a common master could sue jointly merely because engaged in the same work and assisting each other in its execution. Cleland assisted, as was to be expected, because that was what he was hired to do, but mere association in a common task did not create a joint contract. That fact would not enable defendant to hold either liable for the deficiencies or neglects of the other. The fact that defendant filed a plea of set-off cannot affect the question.

The special findings were inconsistent with the general verdict, and it was error to deny defendant's motion.

The judgments of the Appellate Court and circuit court will be reversed, and the cause will be remanded to the circuit court for another trial.

*Reversed and remanded.*

THE HOME INSURANCE COMPANY *v.* GILMAN,  
Executor, *et al.*

SUPREME COURT OF INDIANA. 1887.

[Reported 112 *Indiana*, 7.]

MITCHELL, J.<sup>1</sup> A policy of fire insurance was issued to George Sapp, the alleged owner of a store building, stipulating for insurance against loss or damage by fire to the amount of fifteen hundred dollars.

The policy contained the following stipulation: "Loss, if any, under this policy, payable to W. W. Gilman, executor of the Reynolds estate, as his interest may appear."

The complaint alleged that at the time the policy was issued, to wit, on the 14th day of February, 1885, as, also, when the prop-

<sup>1</sup> A part of the opinion is omitted. — Ed.

erty insured was destroyed by fire — February 16th, 1885, — Sapp was the owner thereof, in fee simple, and that Gilman held a mortgage thereon to secure a debt due him from Sapp, amounting to nine hundred dollars. It also alleged that the amount of the loss exceeded the amount of the debt due Gilman. The appellant contends that Sapp and Gilman cannot maintain a joint action on this policy, and hence that the court erred in overruling the demurrer to the complaint.

The learned court below was of opinion that an action might be so maintained, and, after hearing the proofs, rendered judgment “ that the plaintiffs do have and recover of and from the defendant the sum of \$1,537.51, and that of said sum William W. Gilman, as executor of the estate of Henry Reynolds, deceased, shall first recover the sum of \$949.51, and the plaintiff George R. Sapp shall recover the residue.”

The question is thus presented, whether after the loss Gilman and Sapp had such a joint interest in the policy as entitled them to join as plaintiffs in an action thereon ?

Section 262, R. S. 1881, provides that “ All persons having an interest in the subject of the action, and in obtaining the relief demanded, shall be joined as plaintiffs, except as otherwise provided ”; and by section 269 of the code it is enacted that “ Of the parties in the action, those who are united in interest must be joined as plaintiffs or defendants,” etc.

Section 568 provides that judgment may be given for or against one or more of several plaintiffs, or for or against one or more of several defendants, and that the “ Judgment may, . . . when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves.”

These statutes must be deemed to have modified the extremely technical and arbitrary rules of the common law, in respect to parties and the rendition of judgments. Their effect is, substantially, to adopt the equitable rules of the chancery courts in regard to these subjects, and they require the application of those rules to each case as it arises, whether it be of a legal or equitable character. *Tate v. Ohio, etc., R. R. Co.*, 10 Ind. 174; *Goodnight v. Goar*, 30 Ind. 418; *Pom. Rem.*, sections 200, 215; 1 *Works Pr.* 98, 99.

At the common law it was essential that all those who appeared on the record as plaintiffs should have an interest in the whole of the recovery, so that a judgment *in solido* could be rendered in favor of all the plaintiffs, as, also, against all the defendants.



This rule, never founded upon any substantial reason, has been modified by the provisions of the code already referred to. *Moyer v. Brand*, 102 Ind. 301, and cases cited.

While it has often been decided, under the code, that all persons who join as plaintiffs must have *an interest* in the subject of the action, and that it is necessary that they be united in interest (*Dill v. Voss*, 94 Ind. 590; *Faulkner v. Brigel*, 101 Ind. 329, and cases cited), it does not follow that the interest of all must be equal, or that their interests may not be legally severable. It is, of course, not meant that two or more persons having separate causes of action, although they arise out of the same transaction, and be against the same defendant, may nevertheless unite in the same action. Where, however, there is, as was said in *Tate v. Ohio, etc., R. R. Co.*, *supra*, "one common interest among all the plaintiffs, centering in the point in issue in the cause, the objection of improper parties cannot be maintained," even though the amount of their several interests be unequal, and even though they may be entitled to several judgments, in respect to the amounts to be recovered. All must have some common interest in respect to the subject-matter of the suit, and each must be interested that all have relief in respect to that subject-matter. This creates such a unity of interest as entitles parties so related to a particular subject-matter to unite as plaintiffs in an action. *Martin v. Davis*, 82 Ind. 38.

In the case before us both parties plaintiff had, by contract, a common interest that a recovery should be had upon the policy of insurance. It was the interest of each that the other should recover, as well as that he should recover himself. A recovery by the mortgagee enured to the benefit of his co-plaintiff, in that it established a common right. The amount recovered by the mortgagee went in liquidation of the mortgagor's debt, while a recovery by the latter had a like effect upon the common right, and entitled the former to receive payment out of the sum recovered as his interest in the fund might appear. Each was, therefore, interested in the relief sought by the other, and as both appeared upon the face of the policy to have a common interest, neither being entitled to the whole fund, it was proper for the protection of the defendant that both should be parties. "It was not so material whether they were plaintiffs or defendants, so that their rights under the contract would be barred by the event of the suit." *Morningstar v. Cunningham*, 110 Ind. 328; *Durham v. Hall*, 67 Ind. 123; *May Ins.*, section 449.

There was no error in overruling the demurrer to the complaint. . . .

*Judgment affirmed, with costs.*<sup>1</sup>

# WILLOUGHBY v. WILLOUGHBY.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE.

1830.

[Reported 5 *New Hampshire*, 244.]

ASSUMPTIT. The first count alleged, that the defendant, at H., on the 25th of June, 1828, by his note, &c. for value received, promised Washington Willoughby, or the plaintiff, to pay either of them, \$200 on demand, with interest.

The second count alleged, that the defendant, at H. &c., by his note, &c., for value received, promised the plaintiff to pay him \$200, on demand, with interest.

There was a third count, alleging that the defendant, at H., by his note, &c., for value received, promised to pay Washington or Joseph Willoughby, \$200 on demand, with interest.

<sup>1</sup> In the following cases it was held that all the plaintiffs had an interest in the subject of the action and in obtaining the relief demanded, and a joinder was allowed: *McIntosh v. Zaring*, 150 Ind. 301, 49 N. E. 164 (action by promisees in several contracts to avoid settlement for fraud); *Graves v. Merchants'*, etc., Ins. Co., 82 Ia. 637, 49 N. W. 65 (action on policy of insurance covering separate goods of the several plaintiffs); *Wilson v. Youngman*, 96 Minn. 288, 104 N. W. 946 (action for relief on account of fraud in inducing a joint purchase of land by the plaintiff); *Trompen v. Yates*, 66 Neb. 525, 92 N. W. 647 (action by successive mortgagees of the same goods, jointly in possession thereof, against a converter thereof); *Loomis v. Brown*, 16 Barb. (N. Y.), 325 (action by all the obligees upon an injunction bond, the claims differing in character and amount); *Winne v. Niagara Fire Ins. Co.*, 91 N. Y. 185 (like the principal case); *Rutledge v. Corbin*, 10 Oh. St. 478 (action on an attachment undertaking by the payees and subsequent attaching creditors, some of whom had attached only part of the goods).

In the following cases it was held that all the plaintiffs had not an interest in the subject of the action and in obtaining the relief demanded, and a joinder was disallowed: *Gray v. Rothschild*, 48 Hun (N. Y.), 596, 1 N. Y. Supp. 299, affirmed s. c., 112 N. Y. 668, 19 N. E. 847 (action for damages by vendors of separate goods against fraudulent vendee); *Nagel v. Lutz*, 41 N. Y. App. Div. 193, 58 N. Y. Supp. 816; *Lawrence v. McKelvey*, 80 N. Y. App. Div. 514, 81 N. Y. Supp. 129. See *Pomeroy*, Code Remedies, 4th ed., pp. 161-176, 193-221.

For the rule in equity see *Commonwealth v. Mechanics Ins. Co.*, 120 Mass. 495; *Bradley v. Bradley*, 165 N. Y. 183, 58 N. E. 887; *Cloyes v. Middlebury Electric Co.*, 80 Vt. 109, 66 Atl. 1039, 11 L. R. A. (N. S.), 693. — Ed.

The cause was tried here upon the general issue, at February term, 1830, when the plaintiff offered in evidence to the jury, a note, in the following words:—

*Hollis, June 25, 1828.* — For value received I promise to pay Washington or Joseph Willoughby, \$200 on demand, with interest.

JOHN WILLOUGHBY.

The court being of opinion that the note, upon the face of it, showed a contract with Washington and Joseph Willoughby, and not with either separately, nonsuited the plaintiff, but saved the question for further consideration.

*By the court.* We are of opinion, that the note in this case is evidence of a contract with W. and J. Willoughby, and that *or* in the note must be understood to mean *and*.

Such being the purport of the note upon the face of it, this action cannot be maintained upon it, and the nonsuit must stand. *Blanchenhausen and another v. Blandell*, 2 B. & A. 417, was an action on a note which was described in the declaration as payable to J. P. Damer, or the plaintiffs, and the suit was, like this, brought in the name of the plaintiffs without joining J. P. Damer. The cause was decided in favor of the defendant upon a demurrer to the declaration. But Bailey, J., intimated that an action might be maintained upon the note in the name of all the payees.

*Judgment on the nonsuit.*<sup>1</sup>

<sup>1</sup> See also *Scott v. Godwin*, 1 Bos. & P. 67; *Petrie v. Bury*, 3 Barn. & C. 353; *Wetherell v. Langston*, 1 Exch. 634; *Blanchard v. Dyer*, 21 Me. 111. See Dicey, Parties, p. 104 (rule 13).

For decisions under the code provision that of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants, see *Slaughter v. Davenport*, 151 Mo. 26, 51 S. W. 471; *Burkett v. Lehmen-Higginson Grocery Co.*, 8 Okla. 84, 56 Pac. 856; *Pomeroy*, Code Remedies, 4th ed., pp. 164, 204.

It is sometimes a difficult problem of the substantive law of contracts to determine whether the rights of the promisees are joint or several. See *Anderson v. Martindale*, 1 East, 497; *Sorsbie v. Park*, 12 Mees. & W. 146; *Cipen v. Barrows*, 1 Gray (Mass.), 376; Dicey, Parties, p. 105. The same contract cannot be so framed as to give the promisees joint and several rights. *Slingsby's Case*, 5 Co. 18b; *Bradburne v. Botfield*, 14 Mees. & W. 559. See *Evelth v. Sawyer*, 96 Me. 227, 52 Atl. 639; Dicey, Parties, p. 110 (rule 14). — Ed.

## GAZYNSKI and Wife v. COLBURN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1853.

[Reported 11 *Cushing*, 10.]

SLANDER. The declaration contained two counts; in each of which it was alleged that the defendant uttered certain defamatory words of and concerning the plaintiffs. After a general verdict for the plaintiffs in the court of common pleas, Wells, C. J., arrested judgment, because "the plaintiffs were joined in the same suit for a joint slander upon both, and joint damages were demanded and given for the joint slander of both." The plaintiffs excepted to such decision.

METCALF, J. The judgment in this case was rightly arrested. Each count in the declaration alleges that the defendant spoke certain words of and concerning the plaintiffs, by means of which they have been brought into public scandal and disgrace, and greatly injured in their good name. They have instituted a joint action for a tort that is several and not joint. Separate actions should have been brought; one by the husband alone, for the injury to him, and one by the husband and wife, for the injury to her. *Smith v. Hobson*, Style, 112; *Broom on Parties*, 237.

It has always been held that when words are spoken of two or more persons, they cannot join in an action for the words, because the wrong done to one is no wrong to the other. The case of husband and wife is not an exception to this rule. The exceptions to it are the case of words spoken of partners in the way of their trade, and the case of slander of the title of joint owners of land. *Dyer*, 19 a; *Burges v. Ashton*, Yelv. 128; *Sheppard's Actions upon the Case for Slander*, 52; 1 *Walford on Parties*, 514-516; *Ebersoll v. Krug*, 3 Binn. 555; *Hart v. Crow*, 7 Blackf. 351.

*Exceptions overruled.*<sup>1</sup>

<sup>1</sup> See *Smith v. Cooker*, Cro. Car. 512; *Barrett v. Collins*, 10 Moore, 446; *Dicey, Parties*, p. 380 (rule 80).

For decisions under the codes, see *Rhoads v. Booth*, 14 Ia. 575 (malicious prosecution); *Hinkle v. Davenport*, 38 Ia. 355 (slander); *Bort v. Yaw*, 46 Ia. 323 (deceit); *Morton v. Western Union Tel. Co.*, 130 N. C. 299, 41 S. E. 484 (action against telegraph company for causing mental anguish); *Hellams v. Switzer*, 24 S. C. 39 (action by owners of adjoining lots for damages for nuisance). — Ed.



LE FANU and BULL *v.* MALCOMSON and Others.

HOUSE OF LORDS. 1848.

[Reported 1 *House of Lords Cases*, 637.]

THIS was an action of libel. The plaintiffs in the action were Messrs. Malcomson, the owners of a factory in the county of Waterford; the defendants, Messrs. Le Fanu, were the proprietors of *The Warder* and *The Statesman* newspapers; and the alleged libel was published in the former journal on the 1st of June, and in the latter, on the 4th of June, 1844. . . .

In the published article the plaintiffs as partners owning and operating a cotton factory were accused of mistreating their operatives. The plaintiffs alleged that as a result of the publication of the article, various persons refused to deal with them. The declaration contained thirteen counts. The defendants pleaded the general issue and two special pleas, to which the plaintiff replied. A general verdict with 500*l.* damages was found for the plaintiffs, and judgment was entered thereon. Upon this judgment the defendants brought a writ of error to the Court of Exchequer Chamber in Ireland, and the judgment of the Court of Exchequer was affirmed. The present writ of error was then brought.<sup>1</sup>

THE LORD CHANCELLOR (COTTENHAM). . . . The complaint is made by the plaintiffs in their character of owners and conductors of a factory, and in some of the counts, it is now said, have made the complaint as if there was an injury to themselves individually, and not to them in their character as joint proprietors of the factory. It is very properly admitted that, if the count contains a complaint of that which affects them in their joint character as proprietors, though it may also make a complaint of certain matters which may affect them individually, inasmuch as the complaint of that which affects them in their joint character may be sufficient to support the action, the additional fact that the count also makes another complaint which cannot be maintained, is not sufficient to vitiate the judgment that has been pronounced. Therefore, in looking through these counts, we must see whether there is anything which contains matter applying to the plaintiffs individually, and not to their joint character.

<sup>1</sup> The statement of facts is abridged and a part of the opinion of the Lord Chancellor and the concurring opinion of Lord Campbell are omitted. — Ed.

I have looked through these counts, and it appears to me, that although there may be expressions which, taken by themselves, refer to the individual character of some of the plaintiffs, they contain matter which shews that the complaint is addressed to their character of joint proprietors of the factory.

The fifth count states that the defendants "did compose and publish, &c., a certain other false, wicked, scandalous, and defamatory libel, of and concerning the said plaintiffs, and of and concerning the said factory of the said plaintiffs, and of and concerning the manufacturing of cottons, linens, and other fabries by the said plaintiffs in the said factory, and of and concerning the said trade and calling of the said plaintiffs."

Can it be contended that this is a complaint made of injury sustained by the plaintiffs in their individual character? Is it not in terms descriptive of the injury alleged to be sustained by them in their character of proprietors and managers of the factory in question? It seems to me to be clear that it is so, and that although there may be expressions which ought not to be there, if the complaint was intended to be made of injury sustained by them in their character of joint proprietors, it is quite sufficient on every one of these counts to shew that the complaint was intended to apply to the property which belonged to them jointly, in respect of which, therefore, they are entitled to support an action by themselves as proprietors.

On these grounds, on the two points which were relied on as objections to the judgment of the Court below, I am of opinion that the judgment of the Court below should be affirmed. . . .

*Judgment affirmed, with costs.*<sup>1</sup>

<sup>1</sup> *Medbury v. Watson*, 6 Metc. (Mass.), 246, 39 Am. Dec. 726 (deceit), *accord.* Compare *Barratt v. Collins*, 10 Moore, 446 (malicious arrest). See *Dicey, Parties*, p. 384 (rule 84).

For decisions under the codes, see *Cochrane v. Quackenbush*, 29 Minn. 376, 13 N. W. 154 (malicious prosecution); *Peaks & Co. v. Graves*, 25 Neb. 235, 41 N. W. 151 (deceit).

One partner can sue alone for damage suffered by him individually. *Harrison v. Bevington*, 8 Car. & P. 708. — **ED.**

## BOOTH and Others v. BRISCOE.

COURT OF APPEAL. 1877.

[Reported 2 *Queen's Bench Division*, 496.]

THE plaintiffs were the eight trustees of certain charities at Outwell, near Wisbeach, and brought an action against the Rev. J. G. Briscoe, rector of Outwell, for a libel contained in a letter, written and published by him in the *Wisbeach Chronicle*, commenting on the improper management of the charities by "the trustees." The action was tried at Westminster on the 12th of April, 1877, before Field, J., when a verdict was given for the plaintiffs with 40s. damages. The defendant applied to the Queen's Bench Division to grant a new trial, on the ground that the verdict was against the weight of evidence; or to enter judgment for the defendant, on the ground that the occasion on which the libel was published was privileged.

The Court (Mellor and Lush, JJ.) refused the application on both points.

The defendant appealed. . . .

BRAMWELL, L. J., delivered the judgment of the Court (Lord Coleridge, C. J., and Bramwell and Brett, L. JJ.). In this case we think that the appeal should not be allowed. The principal questions were decided upon the hearing, and it was in reference to a difficulty made by myself that we further considered the case. We say generally that we are satisfied that there was no misdirection. Then as to a new trial, the verdict being for less than 40s., we consider the rule to be still in existence, that where the damages are under 20*l.* a new trial ought not to be granted on the ground that the verdict was against the evidence. The only remaining matter was a doubt I had suggested, whether these eight plaintiffs, if they had any cause of action, had not eight separate causes of action, and whether they could be joined as plaintiffs. I am still of opinion they had eight causes of action, and that they might have brought eight actions; and the question is whether under the Judicature Act any difference has been made so that they can bring one action. Where a tort has been done, the tort is a separate tort to each man who complains. If indeed there were a joint tort, for instance, slander of several persons in partnership, the persons injured would have joined and maintained the action, but could have maintained the action for the joint damage only. Here there is no joint damage. Each man's character, if there is a libel,

has been separately libelled. There is no doubt, therefore, that prior to the Judicature Act this proceeding would have been erroneous, but it seems to us that under Order XVI., Rule 1, these plaintiffs may well join as plaintiffs: "All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative." Now it seems to me that that word "severally" must comprehend the present case. I think therefore that they may very well join; and if several actions had been brought, a consolidation might, if there was any convenience in it, have been ordered by an application under the other rules. But although they might all join, I think, as their damages are several, their damages ought to have been severally assessed, instead of which, 40s. has been given to the whole of them. But who is to complain of that? I do not think that the defendant will suffer by it, because the probabilities are that if the damages had been severally assessed there would have been eight times 40s. damages given. At all events, he does not shew that he is injured by it; and if the plaintiffs have no objection to take the 40s. and divide it amongst themselves, it seems to me that the defendant has no right to complain. As far, therefore, as this is concerned, I see no difficulty in saying that this verdict and judgment should stand.<sup>1</sup>

*Judgment affirmed.*

<sup>1</sup> For the present form of Order XVI., Rule 1, see *infra*, p. 165. The words there printed within brackets formed no part of the rule previous to October, 1896. For decisions previous to the change in the rule, see, in addition to the principal case, *Sandes v. Wildsmith*, [1893] 1 Q. B. 771 (action for separate slanders of the two plaintiffs who were mother and daughter); *Smurthwaite v. Hannay*, [1894] A. C. 494 (action by several shippers and consignees against ship-owners for short delivery); *Peninsular and Oriental Steam Nav. Co. v. Tsune Kijima*, [1895] A. C. 661 (action by several persons injured in one collision); *Carter v. Rigby*, [1896] 2 Q. B. 113 (action by representatives of several persons killed in one accident in a mine). In these cases it was held that there was a misjoinder of parties plaintiff. For decisions subsequent to the change in the rule see *Stroud v. Lawson*, [1898] 2 Q. B. 44 (action against a company and its directors in which plaintiff claimed for himself damages for fraud in inducing him to buy shares in the company, alleging as one element of the fraud that the defendants had declared and paid a dividend on the shares of the company when there were no profits, and seeking on behalf of himself and all other shareholders a declaration that the payment of the dividend was *ultra vires* and illegal and a judgment for the repayment of the amount of this dividend) in which the joinder was disallowed. In the following cases the joinder was allowed: *Drineqbier v. Wood*, [1899] 1 Ch. 393 (action for damages for false representation in a prospectus which induced the several plaintiffs to buy debentures); *Bedford v. Ellis*, [1901] A. C. 1 (action to assert common right to use cart stands in a market). — Ed.



ST. LOUIS & S. F. R. CO. *v.* WEBB.

SUPREME COURT OF OKLAHOMA. 1912.

[Reported 36 *Oklahoma*, 235.]

HARRISON, C. This cause was originally begun in the justice court of Hugo township, Choctaw county, and judgment obtained for \$75. Thereupon an appeal was taken to the county court by the railroad company and judgment there rendered against the company for the sum of \$70, from which judgment the railroad company appeals.

There are two questions involved, either of which would necessitate a reversal of the judgment. First. Whether the plaintiff Webb, was the sole owner or a joint owner of the horse alleged to have been killed. Second. The insufficiency of the evidence as to the negligence of defendant.<sup>1</sup>

As to the first proposition, it is shown by the record that plaintiff, though suing in his own name, was not the sole owner of the animal, for the killing of which suit was brought, but that a half interest in such animal was owned by one A. M. Merrill, and that the court, though requested so to do by the defendant, refused to submit the question of joint ownership to the jury. The plaintiff alleged that the horse in question belonged to him. Mr. Webb testified that Merrill had a conditional interest in the stock, but that he was to stay a certain length of time, and did not stay that length of time; that he bought back Merrill's conditional interest, but the record shows that it was bought back after suit was begun. Merrill testified that he owned an indirect one-half interest in the stock. The record fails to show just what this one-half interest was. It might justify the possible inference that Merrill's interest was in the increase of the stock, but fails to show conclusively what such interest was. But inasmuch as it shows some interest in Merrill, and inasmuch as Webb's right of action depended upon whether he was the owner of the stock sued for, and inasmuch as there was a controversy as to whether he was the sole owner or whether he and Merrill were joint owners, we think the court erred in refusing to submit this question to the jury.

"Persons who have a joint interest must sue jointly for an injury to such interest. Joint owners of property must unite as

<sup>1</sup> Only the part of the opinion relating to the first question is given. — Ed.

plaintiffs in one action for an injury thereto or for a conversion thereof." (15 Pl. & Pr. 544, and authorities cited.) . . .

The case should, therefore, be reversed and remanded.

By the Court: It is so ordered.<sup>1</sup>

## BRAY v. RAYMOND.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1896.

[Reported 166 *Massachusetts*, 146.]

MORTON, J.<sup>2</sup> This was an action of replevin. In order to maintain it the plaintiff was bound to show, as the court instructed the jury, that she was the sole owner of the property replevied. *Hart v. Fitzgerald*, 2 Mass. 509. *Fay v. Duggan*, 135 Mass. 242. *Corcoran v. White*, 146 Mass. 329. The instructions requested were to the effect that if the officer attached and levied on the property as the property of another, and the plaintiff owned an undivided interest in it, she was entitled to recover. They were rightly refused. If she failed to establish that she was the sole owner, the conduct of the officer in attaching the property as the property of another gave her no right of action; an undivided interest was not sufficient. . . .

*Exceptions overruled.*<sup>3</sup>

<sup>1</sup> See Dicey, *Parties*, p. 380 (rule 80); Pomeroy, *Code Remedies*, 4th ed., p. 201. Compare *Soule v. Mogg*, 35 Hun (N. Y.), 79; *Clapp v. Pawtucket Inst. for Sav.*, 15 R. I. 489, 8 Atl. 697, 2 Am. St. Rep. 915. — Ed.

<sup>2</sup> The statement of facts and a part of the opinion are omitted. — Ed.

<sup>3</sup> Co-owners of goods, whether joint tenants or tenants in common, must join in an action of replevin. *Cox v. Morrow*, 14 Ark. 603; *Pritchard v. Culver*, 2 Harr. (Del.), 129; *McArthur v. Lane*, 15 Me. 245; *Hart v. Fitzgerald*, 2 Mass. 509; *Reinheimer v. Hemingway*, 35 Pa. 432. See 1 Chitty, *Pleading*, 16th Am. ed., p. \*74.

As to joinder of plaintiffs in an action of detinue, see *Bolton v. Cuthbert*, 132 Ala. 403, 31 So. 358; *Smoot v. Wathen*, 8 Mo. 522.

Dicey summarizes the rules as to joinder of plaintiffs in tort actions as follows: "1. Persons who have a separate interest and sustain a separate damage must sue separately. 2. Persons who have a separate interest, but sustain a joint damage, may sue either jointly or separately in respect thereof. 3. Persons who have a joint interest must sue jointly for an injury to it." Dicey, *Parties*, p. 380 (rule 80). — Ed.

## HART v. ROBERTSON.

SUPREME COURT OF CALIFORNIA. 1863.

[Reported 21 *California*, 346.]

FIELD, C. J.<sup>1</sup> This is an action to recover the possession of certain real property situated within the city of San Francisco. The plaintiff is the widow of William Hart, late of said city, and claims the premises under two deeds executed to her during her coverture. If those deeds conveyed the premises by way of gift, she took them as her separate property, and is entitled to maintain the present action without reference to any administration upon her husband's estate. If, on the other hand, the instruments were deeds of bargain and sale, as contended by the appellant, the property belonged to the community existing between herself and husband, and upon his death she succeeded, as his survivor, to one undivided half interest therein, the remaining interest descending to his heirs. As tenant in common with the heirs, she could maintain the present action for the possession of the entire premises against the defendant, who is a mere intruder thereon. One tenant in common is entitled to the possession of the entire tract held in common, against all persons but his cotenants and parties claiming under them, and, as a consequence, can maintain against them an action for its recovery. *Stark v. Barrett*, 15 Cal. 371; *Touchard v. Crow*, 20 Id. 162. It does not appear that any administrator was ever appointed upon the estate of William Hart, deceased, or that there were any debts against him which required the appointment of one for their settlement. The right to the possession, therefore, accompanied the title, which vested in the widow and heirs. In *Meeks v. Hahn*, 20 Cal. 620, an administrator had been appointed, and in such case we held that the right to the possession of the real property, of which the intestate died seized, remained exclusively with the administrator until the estate had been settled, or the property had been distributed to the heirs by the decree of the Probate Court.

*Judgment affirmed.*<sup>2</sup>

<sup>1</sup> The statement of facts is omitted. — Ed.

<sup>2</sup> *Clark v. Vaughan*, 3 Conn. 191; *McNear v. Williamson*, 166 Mo. 358, 66 S. W. 160; *Brown v. Warren*, 16 Nev. 228; *Clapp v. Pawtucket Inst. for Sav.*, 15 R. I. 489, 8 Atl. 697, 2 Am. St. Rep. 915 (*semble*), *accord*. But see *Dacey, Parties*, p. 492 (rule 111).

As to the extent of the plaintiff's recovery, see *Moulton v. McDermott*,

## HARRIS v. SWANSON &amp; BRO.

SUPREME COURT OF ALABAMA. 1878.

[Reported 62 *Alabama*, 299.]

THE appellant, M. H. Harris, commenced this action against the appellees, M. B. Swanson & Brother, to recover the statutory penalty for their failure to enter satisfaction on the record of a mortgage, for more than three months after payment and request to enter satisfaction. It was alleged that the mortgage was executed by the plaintiff and one Wright, who were then engaged in a planting partnership, but that all the property covered by it, except the crop raised that current year, was the personal property of the plaintiff. A demurrer for a non-joinder of Wright as party plaintiff having been interposed and sustained by the Circuit Court, the plaintiff offered to amend by making Wright a co-plaintiff, and tendered to said Wright indemnity for all costs and expenses of suit. It was shown that the security tendered was ample. The court then asked said Wright if he was willing to be made a party on the indemnity offered him by the plaintiff. Wright objected to being made a party plaintiff. The plaintiff then offered to show to the court by said Wright that he did not object

80 Cal. 629, 22 Pac. 296; *Winborne v. Elizabeth City Lumber Co.*, 130 N. C. 32, 40 S. E. 825; *Mobley v. Bruner*, 59 Pa. 481.

It has been held that tenants in common of land must not join in ejectment. *Heatherley v. Weston*, 2 Wils. 232; *Stevenson v. Cofferin*, 20 N. H. 150 (writ of entry). See *Chitty, Pleading*, 16th Am. ed., p. \*74. But see *Bush v. Bradley*, 4 Day (Conn.), 298; *Jackson v. Bradt*, 2 Caines (N. Y.), 169. By statute in some states tenants in common may join in ejectment. See *Hicks v. Rogers*, 4 Cranch (U. S.), 165; *West Chicago Park Commissioners v. Coleman*, 108 Ill. 591; *Tilden v. Tilden*, 13 Gray (Mass.), 108.

In an action for damages tenants in common of land may join. *Chamier v. Clingo*, 5 Maule & S. 64; *Daniels v. Daniels*, 7 Mass. 135. And it is generally held that they must join. *Bullock v. Hayward*, 10 Allen (Mass.), 460 (*semble*); *Hill v. Gibbs*, 5 Hill (N. Y.), 56; *De Puy v. Strong*, 37 N. Y. 372 (under code). See *Chitty, Pleading*, 16th Am. ed., p. \*75. At any rate more than one and less than all cannot sue for damages. *Kimball v. Sumner*, 62 Me. 305.

The New York Code of Civil Procedure, sec. 1500, provides that "where two or more persons are entitled to the possession of real property, as joint tenants or tenants in common, one or more of them may maintain such an action, to recover his or their undivided shares in the property, in any case where such an action might be maintained by all." See *Deering v. Reilly*, 167 N. Y. 184, 60 N. E. 447. There are similar provisions in some other States. See *Pomeroy, Code Remedies*, 4th ed., p. 198. — Ed.



to the character or sufficiency of the indemnity, but objected on personal grounds. The defendant objected to this testimony, the court sustained the objection and refused to allow plaintiff to make the proposed amendment, or to compel said Wright to allow himself to be made a party plaintiff, except upon conditions which the plaintiff refused to comply with, and plaintiff excepted. There was a judgment on demurrer for the defendants, and the plaintiff brings the case here by appeal.

BRICKELL, C. J. It is an elementary principle, that when the *legal interest* in a cause of action, whether it arises out of contract, or is *ex delicto*, is joint, residing in several persons, all who are living must join in the action founded on it. One or more of the parties may use the name of all in the commencement and prosecution of the action. If others are unwilling to join in the prosecution, the unwillingness does not authorize a dismissal of the suit. They can and will, on a proper application, be protected by an indemnity against costs, from those prosecuting the suit. All courts have an inherent power to protect themselves and their suitors from an abuse of their process, and to protect the rights and interests of those who have beneficial interests in the subject matter of suits. In *Cunningham v. Carpenter*, 10 Ala. 109, one of the several partners instituted a suit at law in the name of the partnership, and another partner came in and proposed to dismiss the suit so far as he was concerned. The dismissal, if allowed, would have been fatal to the suit. This court said, there would be no substantial difference between allowing a partner to extinguish a partnership debt with his individual debt and allowing him to interfere with a suit his partner had commenced, *especially when the offer was made to secure him against costs*.

The statute authorized the amendment of the complaint, by the insertion of the name of Wright as a plaintiff. When the complaint was amended, Wright, if unwilling to join in the prosecution of the suit, could have demanded from Harris indemnity against the costs, and a reasonable time should have been allowed to furnish it. It was tendered immediately, however, and with its character and sufficiency Wright was satisfied. Being satisfied, his personal unwillingness to prosecute the suit is immaterial, he is not bound if it results in a judgment favorable to Harris and himself, to participate in its fruits; but he is without power to arrest or impede the prosecution of the suit. The indemnity being satisfactory to Wright, it was not the province of the court to require that any other should be given in lieu of it. It is for his personal protection

the indemnity is required, and when such is tendered as he is satisfied with, the court is without further power in the premises.

*Reversed and remanded.*<sup>1</sup>

SEDGWORTH v. OVEREND and Three Others.

KING'S BENCH. 1797.

[Reported 7 *Term Reports*, 279.]

THIS was an action on the case brought by the plaintiff, who was described as the owner of three fourth parts of a ship *The Sally*, against the defendants, the owners of another ship, for so negligently, carelessly, and unskilfully navigating their ship that she run foul of the plaintiff's and sunk her.

The defendants pleaded in abatement that the plaintiff at the time of the injury and loss had no interest or property in the ship *Sally* unless jointly and undividedly with one J. Addison, who is still alive, &c., wherefore inasmuch as J. Addison is not named in the bill the defendants prayed that it might be quashed.

The plaintiff replied that at the time of the injury and loss J. Addison was owner of one fourth part of the ship *Sally*, and the plaintiff was then owner of the remaining three fourth parts: that after the injury and loss and before the commencement of this suit, to wit, in Hilary Term, 35 Geo. 3, Addison impleaded the defendants for the damage sustained by him as owner of the said one fourth part, and in Trinity Term, 36 Geo. 3, recovered against them 472*l.* damages, &c.

To this replication the defendants demurred generally.

LORD KENYON, C. J. I am clearly of opinion that the plaintiff is entitled to judgment. The case is shortly this; there were two persons owners of a ship in unequal proportions, Addison being the owner of a fourth part, and the plaintiff of the remaining three

<sup>1</sup> See *Emery v. Mucklow*, 10 Bing. 23; s. c., 3 Moo. & Sc. 384; *Ingham Lumber Co. v. Ingersoll*, 93 Ark. 447, 125 S. W. 139, 20 Ann. Cas. 1002; *Williams v. Pacific Surety Co.*, 66 Or. 151, 127 Pac. 145, 131 Pac. 1021, 132 Pac. 959, 133 Pac. 1186; *Sweigart v. Berk*, 8 Serg. & R. (Pa.), 308; *Wright v. McLemore & Ray*, 10 Yerg. (Tenn.), 235. See *Dicey, Parties*, p. 108.

Under the codes it is provided that if the consent of one who should be joined as plaintiff cannot be obtained, he may be joined as defendant, the reason therefor being stated in the complaint. See *Coster v. New York & Erie R. R. Co.*, 5 Duer (N. Y.), 677, 3 Abb. Pr. 332; *Williams v. Pacific Surety Co.*, *supra*. Compare *Peck v. McLean*, 36 Minn. 228. — ED.

fourths; the former brought his action against the defendants, the owners of another vessel, for wrongfully running down his ship, and we decided in that case that though the defendants might have pleaded in abatement that another person ought to have been joined with the plaintiff, yet as the defendants omitted to put in such a plea the plaintiff was entitled to recover; and in that case the plaintiff had judgment and obtained a full satisfaction for all the damage that he had sustained to his share of the ship. But that did not satisfy the whole justice of the case, the present plaintiff being the owner of three fourths of the ship; he now brings his action for the injury done to his share, to which the defendants have pleaded that at the time when the injury was done, there was another owner of the ship who ought to have sued jointly with the plaintiff; the plaintiff has stated in his replication the proceedings in the former action to shew that the plaintiff in that action has already received a satisfaction. And the question now is, Whether that person, who has obtained complete satisfaction for the damage which he sustained, ought to have sued as a co-plaintiff in this action? It is said that he ought to have been a party, because he is a trustee for this plaintiff: but that is not correct; they are tenants in common of this ship. Then it was urged that the owners by not suing jointly will harass the defendants by bringing several actions instead of one: but to prevent multiplicity of actions the defendants had an opportunity of taking this objection in the former action; and if they had availed themselves of it at the proper season they would not have been harassed with different actions. I do not see for what good purpose the other part-owner ought to have joined in bringing this action; having already received a satisfaction himself, he could not be entitled to any part of the damages to be recovered in this action, and he is not a trustee for this plaintiff. Therefore on the grounds of law, reason, and justice, I think that this plea ought not to have been put in, and that the replication gives a full answer to it. *Judgment for the plaintiff.*<sup>1</sup>

<sup>1</sup> If one of two joint owners of property sues alone, and no objection is taken to the non-joinder of the other, and judgment is given for the defendant on the merits, the other joint owner may sue alone. *Brizendine v. Frankfort Bridge Co.*, 2 B. Mon. (Ky.), 32.

If the promisor has made a settlement with one of two promisees in regard to his share, the cause of action is severed, and the other promisee may sue alone. *Boston & Maine R. R. v. Portland, etc., R. R. Co.*, 119 Mass. 498. But see *Angus v. Robinson*, 59 Vt. 585, 8 Atl. 497, 59 Am. Rep. 758. — Ed.

## B. Defendants.

BURGOYNE, Administrator, and MILLER *v.* OHIO LIFE INSURANCE & TRUST COMPANY.

SUPREME COURT OF OHIO. 1855.

[Reported 5 *Ohio State*, 586.]

RANNEY, C. J. The action in the court below, was brought upon a joint and several promissory note signed by Ludlow, Miller, and Dudley; the last of whom was not served with process. The demurrer filed by Ludlow's administrator, was overruled, and a several judgment, in due form, entered against him, to be levied of the goods, etc., of the intestate, and also a judgment against Miller on default. It is now insisted that these several parties could not be joined in the same action; that the obligation must have been treated by the creditor as either joint or several; in the one case warranting only a single judgment against the survivors, and in the other, requiring a separate action against each of the parties or their personal representatives. By a settled rule of common law, the death of one of the joint makers of an obligation, extinguished all remedy at law against his estate. If the contract was joint, the action must be joint, and a joint judgment must follow. But as the same judgment could not be rendered against the survivor, and the personal representative of the deceased party, the consequence was, that no action at law could be maintained against the personal representative, either jointly with the survivor or by a separate suit. 1 Chitty's Pl. 187; *Brigden v. Park*, 2 B. & C. 424; *Ashby v. Ashby*, 7 Id. 444; *Demott v. Field*, 7 Cow. 58; *Corner v. Shew*, 3 M. & W. 350.

In such cases relief was afforded in chancery, but only when a necessity for such interposition was shown to exist; and, therefore, only upon the condition that the remedy at law against the survivor, had proved fruitless. 3 Denio, 65; 2 J. C. Rep. 508; 1 Story's Eq., sec. 162; 11 Paige Rep. 80; 10 Id. 101.

And inasmuch as no equities arise against a surety, and he is only legally bound upon the strict terms of the obligation into which he has entered, there is no small show of authority in the early cases for affirming, that no such interference can be invoked against the estate of a party thus situated. *Hoar v. Contanien*, 2 Bro. C. C. 27; *Sumner v. Powell*, 2 Mer. 30; *Ex parte Kendall*,



17 Ves. 519; *Weaver v. Shryork*, 6 Serg. and R. 262; 1 Story's Eq., sec. 164.

In view of the difficulties which surrounded this subject at the common law, legislation became imperative; and it has been fully supplied. By the 90th section of the act to provide for the settlement of the estates of deceased persons (Swan's Rev. Stat. 378), it is enacted, that "when two or more persons shall be indebted in any joint contract, or upon a judgment founded upon any such contract, and either of them shall die, his estate shall be liable therefor, *as if the contract had been joint and several, or as if the judgment had been against himself alone.*" This statute effected an entire abrogation of the common law principle to which allusion has been made; and left the estate of the deceased joint debtor liable to every *legal* remedy, as fully as though the contract had been joint and several. Until the passage of the act to establish a code of civil procedure, it is very true, his personal representative and the survivor could not be sued in the same action. But by the 38th section of that act, it is provided, that "persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may, *all or any of them*, be included in the same action, at the option of the plaintiff." And the 371st section allows a several judgment to be given against any one of the defendants, as the nature of the case may require.

In the opinion of the court, these sections permit the joinder of the survivor or survivors, and the personal representative of the deceased obligor, in the same action, whether the contract is in terms joint and several, or made so by the 90th section of the administration law upon the death of a joint obligor; and authorizes a several judgment to be rendered against each, according to the nature of their respective liabilities. We are aware that these provisions of our code, are almost literally copied from corresponding provisions in the code of New York; and that a different construction was placed upon them by a single judge of the supreme court of that State, in the case of *Morehouse v. Ballou*, 16 Barb. Rep. 289. With all proper respect for the opinions of each of the thirty-two judges of which that court is composed, we think it much safer to rely upon the obvious import of the language of our code, liberally interpreted with a view to the objects intended to be attained, than upon the multitude of conflicting decisions to be found in the reports of the supreme court of New York. But if we were bound to follow a New York decision, we need not go beyond the volume to which we have been referred, to find authority for our

position, and a direct contradiction to the case above cited. In the case of *Parker v. Jackson*, 16 Barb. 33, decided at a general term of the supreme court, by four judges, it was held that all the parties severally liable upon the same instrument might be prosecuted in the same action, and *several* judgments be entered; that such a proceeding was to all intents, under the code, a several action, giving the full right to separate defenses; and that such an action might be maintained against the surviving debtor, and the representatives of a deceased co-debtor, without alleging the insolvency of the survivor. On the whole, we can find no error in the proceedings of the court below, and its judgment should be affirmed.<sup>1</sup>

McCALL v. PRICE.

CONSTITUTIONAL COURT OF SOUTH CAROLINA. 1821.

[Reported 1 *McCord, Law*, 82.]

THIS was an action of debt, on a joint bond of one Thomas Nichols, and defendant. An appearance was entered for defendant; but as to Thomas Nichols, the sheriff returned that he was absent from the State, and could not be found. The plaintiff declared against the defendant, stating, in his declaration, that the said co-defendant or obligor, Thomas Nichols, was absent and could not be served with process. To this, defendant pleaded in abatement, that Nichols was joined as an obligor with her, and that he was alive, &c.

In reply, the plaintiff alleged that said Nicholas was absent from the State, and could not be served with process.

To this replication, defendant demurred.

<sup>1</sup> At common law parties severally liable in contract could not be joined as defendants. But the code provision that one or more of the persons severally liable on a written instrument may be included in the same action at the option of the plaintiff has been widely adopted. See *Pomeroy, Code Remedies*, 4th ed., pp. 299, 393-404.

On the question of the right under statutory provisions to join survivors of joint debtors with representatives of a deceased debtor, see *Braxton v. State*, 25 Ind. 82; *Lee v. Blodget*, 214 Mass. 374, 102 N. E. 67; *Voorhis v. Child's Executor*, 17 N. Y. 354. Compare *Potts v. Dounce*, 173 N. Y. 335, 66 N. E. 4. And see *Pomeroy, Code Remedies*, 4th ed., p. 292.

As to the right to join an agent and an undisclosed principal in an action on a contract, see *Gay v. Kelley*, 109 Minn. 101, 123 N. W. 295, 26 L. R. A. (N. S.), 742; *Tew v. Wolfsohn*, 77 N. Y. App. Div. 454, 79 N. Y. Supp. 286, affirmed 174 N. Y. 272, 66 N. E. 934. — ED.

This demurrer and plea in abatement, was overruled by his honor, after argument, on the grounds, that as the process of outlawry was not known to our laws, and there ought to be a remedy, he thought that the lodging of a writ against Nichols, the co-obligor, being the first step towards making him appear, was, on the return of the sheriff that he was absent from the state, sufficient to enable the plaintiff to declare against the obligor who was served.

From this decision, the plaintiff appealed to the Constitutional Court upon the following grounds:

1st. Because, when the parties are jointly and not severally bound, as they are here, the obligee must sue them jointly.

2d. Because, if the process of outlawry be known to our laws, it should have been sued out against the co-obligor, Thomas Nichols, before the defendant, Mrs. Price, could be legally charged with the whole debt.

3d. Because, if such outlawry process be unknown to our laws, there is no remedy at law for the plaintiff, and the Judges cannot make one.

COLCOCK, J. The common law doctrine, that where there are two joint obligors, both must be sued, is too familiar to admit of doubt; also, that it has been decided in England, that where one of two joint obligors is out of the kingdom, the plaintiff must proceed to outlawry against him. *Sheppard v. Baillie*, 6 Term Rep. 327. But I am of opinion that the process of outlawry is obsolete, and contrary to the spirit and principles of our government. It would be inconvenient in practice, if not utterly impracticable, without some legislative provision; and therefore there is no remedy, unless the plaintiff be allowed to proceed in the manner in which he has proceeded. I take it that it is incumbent on us to pursue the common law, only so far as the same is consistent with the principles and spirit of our government, and that in this instance I have done so. By the common law of England, it is established, that where there are two joint obligors, both must be sued. By the same law, a remedy is given, where one is without the kingdom. Shall it be said we are to adopt the first provision of the law, when the other cannot be applied? I am ready to say we are not bound to do so. Again, if the process of outlawry in such a case as the present were resorted to in England, what would result? That it would appear that one of the joint obligors was absent from the kingdom, and without the control of the law. The plaintiff could then compel the other defendant to pay the debt.

Now does not the same thing appear to us ? The one who was compelled to pay the debt, would not be benefited; for if there are no goods to be forfeited, nothing could be obtained for him by the outlawry.

But it is said we cannot know, nor can the fact be put on the record, that the absent debtor has no goods. The answer is plain, if he have any, let the co-obligor find them; for it may be reasonably supposed that he is best acquainted with the circumstances of the absent person. If a remedy did not exist in England by process of outlawry against the absent joint obligor, I have no doubt that it would be held, that a voluntary abjuration of the realm was a destruction of that unity of responsibility which renders it necessary that both should be sued; and this I think is supported by the analogies of the law. "A husband who hath abjured the realm, or is banished, is thereby *civiliter mortuus*; and being disabled to sue, or be sued, in right of his wife, she must be considered as a *feme sole*." And what is the reason assigned ? For it would be unreasonable that she should be remediless on her part, and equally hard upon those who had any demand on her, that not being able to have any redress from the husband, they should not have any against her. 1 Bacon, Title Baron & Feme, letter M. Now, I cannot conceive that the unity of interest and person, between two joint obligors, can be greater than that which the law recognizes between husband and wife; and if the voluntary absence of one of the parties in the one case is considered as a dissolution of the legal unity, I cannot conceive why it should not be so in the other. But a majority of my brethren are of opinion that the plaintiff cannot recover; that both the co-obligors, in a joint contract, must be sued, and that however hard, there is no remedy which this Court can apply.

*The motion is granted.*

JUSTICES NOTT, JOHNSON, and HUGER, concurred in granting the motion.

JUSTICE GANTT, I concur in the opinion expressed by my brother COLCOCK.



## BLESSING v. McLINDEN.

COURT OF ERRORS AND APPEALS OF NEW JERSEY. 1911.

[Reported 81 *New Jersey Law*, 379.]

PITNEY, CHANCELLOR. The record shows that Blessing, now defendant in error, commenced suit in the Cape May Circuit Court against William H. Quigg and James McLinden (the latter now plaintiff in error), to recover the amount due upon a judgment theretofore rendered against them as co-partners in a court of record of the State of Pennsylvania. Summons against both defendants was issued to the sheriff of the county of Cape May, and to it the declaration was annexed as permitted by the Practice act. Pamph. L. 1903, p. 564, § 95. The sheriff returned that the summons and declaration were served personally upon McLinden, and that Quigg could not be found in his county, and according to the information and belief of the sheriff was a resident of the State of Pennsylvania.

The defendant, McLinden, appeared, and filed certain pleas, which, on motion of the plaintiff, were struck out upon the ground that they were sham and frivolous and did not set up any defence to the action.

Judgment by default was thereupon entered in behalf of the plaintiff, and against McLinden alone as defendant, for the amount claimed to be due upon the Pennsylvania judgment, with costs.

The grounds relied upon for reversal are — *first*, that the Circuit Court erred in striking out the pleas;<sup>1</sup> and *secondly*, that the court erred in rendering judgment against the defendant, McLinden, alone, whereas it is insisted that under the “Act concerning obligations,” approved March 27th, 1874 (Gen. Stat., p. 2336, § 2), the judgment, if any judgment was lawful, should have been against both Quigg and McLinden as co-partners. . . .

The pleas being thus eliminated, and the plaintiff having thereupon proceeded to take judgment by default as for want of a plea, it remains to be considered whether his judgment against McLinden alone is erroneous. As to this, the argument is that under section 2 of our act concerning obligations<sup>2</sup> (Gen. Stat., p. 2336),

<sup>1</sup> A part of the opinion in which it was held that the action of the court in striking out the pleas was not reviewable, and certain other parts of the opinion, are omitted. — *Ed.*

<sup>2</sup> Section 2 of the Act provides “That all persons jointly indebted to any other person or persons, upon any joint contract, obligation, matter, or thing,

while one of two defendants jointly indebted to the plaintiff may be required to answer, he nevertheless remains only jointly liable; that the judgment provided for by the act must be a joint judgment, and may not be a judgment against the answering defendant alone; that the act may not be reasonably construed to change a joint liability to a several liability; that by virtue of the adoption of the fourteenth amendment of the federal constitution, as construed by the Supreme Court of the United States in *Pennoyer v. Neff*, 95 U. S. 714, our statute is either rendered totally ineffective, or must be limited in its effect as against the joint debtor not served so as to be enforceable only against the joint property; but that in any event the act requires that the judgment shall go against all the joint obligors or against none. . . .

The purpose and effect of the act will be better understood after a brief reference to the law as it theretofore stood.

The old English practice respecting actions against joint debtors, some only of whom could be served with process, was to proceed to outlawry against the absent or absconding defendant, and having done this to prosecute the action against the defendant who was served, declaring against him alone upon a joint contract made by him and the absentee. 1 Tidd Pr. (3d Am. from 9th London ed.) \*130, 131; 1 Chit. Pl. (13th Am. from 6th London ed.) \*42; 2 Id. \*8.

But this practice did not rest upon the ground that the joint contractor, who was within the jurisdiction, had any right to have his fellow joined as defendant if the latter were without the jurisdiction. The law did not deny a recovery against one joint contractor because his co-contractor could not be served with process. The non-joinder of one of several joint contractors could be availed of only by plea in abatement, and such plea must inform the plaintiff of the names of the parties not joined, and must state that they were still living unless this appeared on the face of the declaration.

for which a remedy might be had at law against such debtors, in case all were taken by process issued out of any court of this state, shall be answerable to their creditors separately for such debts; that is to say, such creditor or creditors may issue process against such joint debtors, and in case any of such joint debtors shall be taken and brought into court, by virtue of such process, such of them so taken and brought into court shall answer to the plaintiff or plaintiffs; and if judgment shall pass for the plaintiff or plaintiffs, he, she or they shall have his, her, or their judgment and execution against such of them so brought into court, and against the other joint debtor or debtors named in the process, in the same manner as if they had all been taken and brought into court by virtue of the said process." — ED.

Rice v. Shute, Burr. 2611; 1 Smith Lead. Cas. (H. & W. ed.), \*645 and notes; 1 Chit. Pl. \*43, 46; 2 Id. \*901; Mershon v. Hobensack, 2 Zab. 372, 379; 3 Id. 580; Lieberman v. Brothers, 26 Vroom, 379; Dic. Part. 11, 12.

Under the ancient practice, a plaintiff who commenced his action against one only of two joint obligors, where the other resided beyond seas, subjected himself to the risk that the action might be abated and he be put to the cost and delay of a new action with proceedings for outlawry. It was principally in order to avoid this risk, and not because of any apprehension that the right of action against the resident debtor would otherwise be in jeopardy, that a prudent plaintiff instituted his suit against both joint debtors and took proceedings for outlawry, in the first instance, if one of the joint debtors was absent or absconding. In some cases, no doubt, it was deemed important to join the absentee in order either to enforce a forfeiture of his property or to avoid waiving the right to proceed against him in a subsequent action. See 1 Chit. Pl. \*46; per Coltman, J., in Joll v. Lord Curzon, 4 Man. Gr. & S. (C. B.) 255.

The English practice was amended by statute 3 and 4 William IV., chapter 42, section 8, which required that a plea in abatement for non-joinder of a defendant should be accompanied by an affidavit stating the *residence in England* of the omitted defendant (1 Chit. Pl. \*46), the practical effect of which was to prevent the resident debtor from objecting to the non-joinder of his co-obligor unless the latter resided within the jurisdiction. Dic., Part. rule 49, 230, 232. And see our Practice act, section 38, Pamph. L. 1903, p. 545.

In our colonial times, proceedings to outlawry not being in use here, the doubt arose that is referred to in the preamble of our act of 1771, which was solved for this colony by requiring the resident debtor to answer, and permitting judgment to be taken against him and the non-resident together. (Pennsylvania adopted the simpler solution of holding that as there was no process of outlawry in civil actions, the return of *non est inventus* had the same effect. Dillman v. Schultz, 5 S. & R. 35.) The effect of our act was to prevent the abatement of the action for failure to proceed to outlawry against the non-resident joint debtor, and to provide that the plaintiff might take judgment against him as well as against the debtor who was served with process. . . .

Even prior to the adoption of the fourteenth amendment, however, it was well settled that if one of the debtors was not within

the state, not served with process, and did not voluntarily appear, the judgment could not be enforced against him in any other jurisdiction, even though by the *lex loci* a service on the co-obligor resident within the jurisdiction were sufficient to authorize a judgment against all. *D'Arcy v. Ketcham*, 11 How. 165; *Thompson v. Whitman*, 18 Wall. 457; *Knowles v. Gas Light and Coke Co.*, 19 Id. 58; *Hall v. Lanning*, 91 U. S. 160; *Hanley v. Donoghue*, 116 Id. 1; *Renaud v. Abbott*, 116 Id. 277; *Phelps v. Brewer*, 9 Cush. (Mass.) 390. . . .

Until the adoption of the fourteenth amendment, however, it was commonly held that a state might authorize a personal judgment, good within its own territory, against one who had not been subjected to the process of its courts by service of such process within the jurisdiction.

But by that amendment it was (among other things) provided that no state should deprive any person of life, liberty or property without due process of law, and this was construed by the Supreme Court of the United States in *Pennoyer v. Neff*, 95 U. S. 714, 733, to deprive a personal judgment of all validity, either within or without the state that rendered it, if it were rendered by a state court in an action upon a money demand against a non-resident served by a publication of notice or summons, but upon whom no personal service of process within the state had been made, and who had not appeared to the action.

See *Elsasser v. Haines*, 23 Vroom, 10, 15; *Smith v. Colloty*, 40 Id. 365, 371.

We deem it clear that one effect of the amendment, as thus construed, was to render it unlawful in an action against joint debtors, under our statute, to give judgment against any debtor not brought into court by virtue of its process, at least in case such debtor be not a citizen or resident of this state. And so our Supreme Court intimated in *United States v. Griefen*, 44 Vroom, 195, 197.

The act, in its latest revised form, was enacted in 1874, subsequent to the adoption of the fourteenth amendment, which occurred in 1868. But, upon familiar principles, the act speaks as of the time of its original enactment (*Smith v. Colloty*, 40 Vroom, 370, and cases cited), and therefore may be treated as having been followed by that amendment, and nullified *pro tanto* by it, rather than as having been subsequently enacted in the teeth of the constitutional prohibition.

Nor is the statute, as thus amended, any the less a practical working enactment. Its primary purpose, as evidenced not only



by its provisions but by the original preamble in Allinson, was to subject the resident joint debtor to responsibility. This object was sought to be carried out by authorizing the plaintiff to take judgment and execution "against such of them so brought into court and against the other joint debtor or debtors named in the process." Eliminating the "other joint debtor or debtors" on the ground that they have not been served with process, still leaves the statute as permitting a judgment against such joint debtors as have been brought into court.

The result is that where one of two joint debtors resides within this jurisdiction and the other is a non-resident, and is not found to be served with process in this state, the plaintiff may have his judgment against the resident debtor, omitting the other. This was the practical outcome, in ordinary cases, under the common law practice of outlawry. . . .

We find it unnecessary to consider whether the principle of the decision in *Pennoyer v. Neff* would invalidate a judgment rendered in conformity to our Joint Debtors' act against one of the several joint debtors (the others only being served with process), he being a citizen and resident of this state. See *Moulin v. Insurance Company*, 4 Zab. 249, per Chief Justice Green. That precise question does not require decision in order that the present case may be disposed of. For we may properly make, and ought to make, every reasonable intendment in favor of the validity of the judgment under review, and therefore may legitimately assume, if necessary, that the defendant Quigg was not a citizen or resident of this state, and could not in any manner be rendered subject to its jurisdiction.

We, therefore, find no error in the entry of judgment against the defendant McLinden alone.

Whether the plaintiff, by taking judgment against one only of the joint debtors, debars himself from any future recovery against the other, is a question that does not now concern us. There seems to be a conflict of authority upon the point. See *Freem. Judg.* (4th ed.), §§ 231, 233; *Big. Estop.* (5th ed.) 104.

*The judgment under review should be affirmed.*<sup>1</sup>

<sup>1</sup> See *Hall v. Lanning*, 91 U. S. 160, 23 L. ed. 271; *Yerkes v. McFadden*, 141 N. Y. 136, 36 N. E. 7; *Heaton v. Schaeffer*, 34 Okl. 631, 126 Pac. 797, 43 L. R. A. (N. S.), 540; and see 50 L. R. A. 595.

For the general common law rule as to joint obligations, see *Dicey, Parties*, p. 230 (rule 49). Parties may be at once jointly and severally liable upon the same contract, in which case they may be sued either jointly or separately.

HENRY DE BODREUGAM *v.* THOMAS LE  
ARCEDEKNE.

CORNISH ITER. 1302.

[Reported *Year Book* 30 *Edward I.*, 106.]

HENRY de Bodreugam complained by bill, that Thomas le Arcedekne tortiously and against the peace of our lord the King, came with force and arms at a certain day, year, and place, and assailed, beat, and wounded him, and his goods, &c.; and that tortiously and against the peace he took away William, son and heir of B., who was in his wardship, and to his damage, &c. — *Middelton* denied the tort and force, and as to its being against the peace of our lord the King, and the coming, &c.; and said that Thomas did nothing against the peace. So a jury was summoned. THE INQUEST said that Sir Ralph de Bloyon, on the same day as that complained of by Henry de Bodreugam, came to the inn of Thomas le Arcedekne, and there they had a long conversation; and afterwards Sir Ralph and Thomas and their followers went to the house of William Beyon, where Sir Henry was. Sir Ralph entered, together with all the others, except Thomas who did not enter, and requested Henry that he would deliver up to them an infant who was in ward to him; but Henry would not do so. Strife arose between them, and Henry was beaten and wounded, as he complains of having been. — BRUMPTON. What right had Sir Henry to the wardship? — THE INQUEST. None, save the wardship of the infant by virtue of his mother having delivered him (to Henry) in consequence of a disagreement between Sir Ralph and the mother. — BRUMPTON. After the fact, where did they go? — THE INQUEST. To the house of Thomas, and there the infant remained full three days afterwards. — *Middelton*. Sir, bear in mind that Sir Thomas did not beat or wound, as stated in the plaint. — SPIGONEL. If three thieves come to a man's house, and one forces and enters the house, and the other two stand outside in the meantime, they shall all three be taken and convicted of this, whatever judgment you may think will be

Dicey, *Parties*, p. 233 (rule 50). But more than one and less than all should not be joined.

In some states the codes provide that where two or more persons are jointly bound by contract, the action thereon may be brought against all or any of them at the plaintiff's option. See Pomeroy, *Code Remedies*, 4th ed., pp. 81, 288. — Ed.

passed on the two. — *Middelton*. It is different in case of burglary or appeal of death of a man, from what it would be in trespass. — *BRUMPTON*. Go on now to the damages, and tell us if they carried away any goods or armour, &c. — *THE INQUEST*. They did not carry away any chattels, but we assess his damages at one hundred marks. — *Middelton*. Sir, there are others who committed the trespass, and against whom the plaintiff can recover; we entreat you to take this into consideration. — *BRUMPTON*. Know that none of the others shall ever take exception by reason of this judgment for he has his action against each one, and each one is liable to the whole, and he shall recover his damages against each one severally, if he choose to sue him; and forasmuch as he is convicted by having gone armed in company with Sir Ralph, and his followers entered the house as before-mentioned, thereby it well appears that he was an assenting party to what took place, and we consider him altogether as a principal, and the Court adjudges that Henry do recover his damages, which are assessed at a hundred marks, and that Sir Thomas do go to prison.<sup>1</sup> . . .

### MITCHELL *v.* TARBUTT and Others.

KING'S BENCH. 1794.

[Reported 5 *Term Reports*, 649.]

THIS was an action on the case for negligence, wherein the declaration stated, That whereas one J. Jones and one G. Bolland, at the time of committing the grievance therein after mentioned, were possessed of a certain ship called the Albion, which was then proceeding on a voyage from Jamaica to Bristol, and that there were then on board the said ship 600 hds. of sugar belonging to the plaintiff; and that whereas the said G. Tarbutt, N. A., J. H., D. T. and J. E. (the defendants), were at the time when, &c. possessed of a ship called the Amity Hall, whereof one G. Young was then master, then also sailing on the high seas, and the said G. Young, their servant in that behalf, then and there had the management of the said ship Amity Hall; yet, that the defendants, by their said servant, so negligently navigated their ship that the said ship by the negligence of their servant with great force struck against the said ship of Jones and Bolland, then sailing with the plaintiff's goods on board, and so damaged the goods that they were wholly lost to the

<sup>1</sup> A part of the case is omitted. — Ed.

plaintiff. To this the defendants pleaded in abatement, that the grievance (if any) was committed by the defendants, and one A. Shakespear, C. Byran, S. Orr, and J. Neuffville jointly, and not by the defendants only. To which there was a general demurrer, and joinder.

LORD KENYON, CH. J. With regard to the last case cited, there certainly is a distinction in the books between cases respecting real property and personal actions: where there is any dispute about the title to land, all the parties must be brought before the Court. But upon this question it is impossible to raise a doubt. I have seen the case of *Boson v. Sandford*, in the different books in which it is reported, in all of which this doctrine is clearly established, that if the cause of action arise *ex contractu*, the plaintiff must sue all the contracting parties; but where it arises *ex delicto*, the plaintiff may sue all or any of the parties, upon each of whom individually a separate trespass attaches. The case of *Boson v. Sandford* was treated by the whole Court as an action for a breach of contract; there indeed it was also determined that the defendant might take advantage of the objection, that all the contracting parties were not sued, on the plea of *non assumpsit*, but that being found inconvenient, a contrary doctrine has been since established. *Vide Rice v. Shute*, 5 Burr. 2611; *Abbot v. Smith*, *Ib.* 2614, 5; and *Germaine v. Frederic*, Tr. 25 Geo. 3, B. R. But this being an action *ex delicto*, the trespass is several: and it is immaterial whether the tort were committed by the defendant or his servant, because the rule applies *qui facit per alium, facit per se*.

GROSE, J. The same distinction between the actions of *tort* and *assumpsit* was laid down in *Child v. Sand*, Carth. 294.

LAWRENCE, J. In Carth. 171, it was held that an action for a false return to a mandamus was founded on a *tort*, and that "therefore it might be either joint or several, at the election of the party, as in trespass," &c. *Judgment for the plaintiff*.<sup>1</sup>

<sup>1</sup> If several persons actively co-operate in the commission of a tort all may be joined as defendants. *Boston v. Simmons* 150 Mass. 461, 23 N. E. 210 (fraud); *Ess v. Griffith*, 128 Mo. 50, 30 S. W. 343 (successive converters). See Cooley, Torts, 3d ed., p. 244. Or any number less than all may be joined. *Brady v. Ball*, 14 Ind. 317 (joint owners of trespassing animals); *Heartz v. Klinkhammer*, 39 Minn. 488, 40 N. W. 826 (joint converters); *Roberts v. Johnson*, 58 N. Y. 613 (partners whose employee negligently injured the plaintiff). — ED.



CASEY PURE MILK COMPANY *v.* BOOTH FISHERIES COMPANY and Another.

SUPREME COURT OF MINNESOTA. 1913.

[Reported 124 *Minnesota*, 117.]

HALLAM, J. Plaintiff sues two defendants, alleging that an order for goods was received from defendant Produce Company; that on October 12, 1910, plaintiff took the goods to the building occupied by both defendants, and, although the goods were intended for the Produce Company, they were delivered to defendant Fisheries Company; that the next day plaintiff notified the Fisheries Company to deliver the goods to the Produce Company and the Fisheries Company agreed to do so; that on the first of the following month plaintiff demanded payment of the Produce Company, that the Produce Company denied receiving the goods; that the Fisheries Company, on inquiry, stated that it had delivered the goods to the Produce Company. It is alleged that one or the other of defendants received the goods and converted them to its own use, but, which one, plaintiff is unable to determine by reason of the counterclaims of defendants. Defendants demur separately on the ground that the complaint states no cause of action.

We cannot sustain this complaint. We do not wish to detract from the very wholesome rule that pleadings should be liberally construed, but there are a few cardinal principles of pleading that must be observed. One of them is that a complaint must state, with ordinary directness, facts which constitute a cause of action against each defendant. If the facts are not within the knowledge of plaintiff or his attorney, they may be alleged upon information and belief. This complaint does not allege facts showing liability of either defendant. Both defendants might answer admitting every allegation of the complaint, and still the court could not order judgment on the pleadings against either defendant.

We are of the opinion that this form of pleading is not permissible under the code procedure, and such we believe to be the generally accepted rule. *Price v. Virginia-Carolina Chemical Co.* 136 Ga. 175, 71 S. E. 4; *Brown v. Illinois Cent. R. Co.* 100 Ky. 525, 38 S. W. 862; *Oglesby's Sureties v. State*, 73 Tex. 658, 11 S. W. 873; 30 Cyc. 131. A different practice prevails in some jurisdictions, but this is by virtue of express provisions of statute. *Honduras Inter-Oceanic Ry. Co. v. Lefevre & Tucker*, 36 L. T. (N.S.),

46; *Child v. Stenning*, 36 L. T. (N.S.), 426; *Bennetts & Co. v. Mellwraith & Co.* 75 L. T. (N.S.), 145; *Phenix Iron Foundry v. Lockwood*, 21 R. I. 556, 45 Atl. 546; *Rules of Practice*, 58 Conn. 561, 20 Atl. v.

There is some authority for the proposition that an exception is made in cases where it is impossible to determine where liability rests, by reason of some close relation between defendants, or of some conduct on the part of defendants, and that in such cases both parties may be joined with an alternative allegation that the acts constituting liability were committed by one or the other. See *Braun & Ferguson Co. v. Paulson*, (Tex. Civ. App.) 95 S. W. 617. Whether such circumstances give rise to an exception to the rule, we need not determine, for it does not appear that this is an exceptional case. The complaint contains no allegation of any close relation or community of action between these parties, except that they are tenants of the same building. It does not allege that they occupy the same business premises. The fact is, plaintiff made the mistake of delivering to one business house goods intended for another, and, instead of taking the trouble to make the transfer itself, relied upon the promise of the party to whom it made delivery to do so. The ultimate question in the case will doubtless be whether the Fisheries Company did transfer the goods to the Produce Company, as it promised to do. Similar questions are liable to arise in any case where one person is directed to deliver goods to another, to pay money to another, or to carry on almost any form of business negotiation with a third party. Similar situations may often be presented in negligence cases where one person is injured in the region of operation of two others.

Plaintiff's counsel states in his brief that he suggested to his adversaries that he amend his complaint so as to allege liability of both defendants. Had he asked this of the court on the hearing, his petition would doubtless have been granted. *Harp v. Bull*, 3 How. Pr. (N. Y.), 44; *Lord v. Hopkins*, 30 Cal. 77; 31 Cyc. 396. But he did not do this. He saw fit to stand upon the complaint as originally framed. However, the defects in plaintiff's complaint relate to matters of form. Demurrers and appeals on this ground are not encouraged, and no costs will be allowed to the appellant.

*Order reversed.*

## RUSSELL v. TOMLINSON and HAWKINS.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1817.

[Reported 2 *Connecticut*, 206.]

THE declaration alleged, that the defendants, with force and arms, entered upon the land of the plaintiff, and with their dogs, by them owned and kept, chased, worried and killed, twenty-eight sheep, of the plaintiff, of the value of 500 dollars, contrary to the statute law, in such case made and provided.<sup>1</sup>

The cause was tried at New Haven, January term, 1817, before Trumbull, Hosmer and Gould, Js.

On the trial, it appeared, that the trespass complained of, in the plaintiff's declaration, was committed by two dogs, at the same time, and jointly, but without the consent or knowledge of the defendants, or either of them. The defendants did not own these dogs jointly; but one of the defendants owned one dog, and the other defendant owned the other dog. The defendants, therefore, contended, they were not jointly liable for the injury done by dogs, thus owned by them severally. But the court charged the jury, that if they should find that the plaintiff's sheep were worried and killed by dogs, as set forth in the declaration, and that each of the defendants owned one of those dogs, they must find both of the defendants guilty, and award damages against them in the plaintiff's favour. The jury found a verdict against the defendants; and they moved for a new trial, on the ground of a misdirection. This motion was reserved for the consideration and advice of the nine Judges.

SWIFT, C. J.<sup>2</sup> Owners are responsible for the mischief done by their dogs; but no man can be liable for the mischief done by the dog of another, unless he had some agency in causing the dog to do it. When the dogs of several persons do mischief together, each owner is only liable for the mischief done by his own dog; and it would be repugnant to the plainest principles of justice, to say, that the dogs of different persons, by joining in doing mischief, could

<sup>1</sup> This statute provides, "That the owner or owners of any dog or dogs shall be responsible for all damages, which such dog or dogs may do, by wounding or destroying sheep, although such owner or owners, may not have known such dog or dogs to be accustomed to do such mischief; and all such damages may be recovered by action of trespass against such owner or owners." 1 Stat. Conn., tit. 145, c. 2.

<sup>2</sup> The concurring opinion of Gould, J., is omitted. — Ed.

make their owners jointly liable. This would be giving them a power of agency, which no animal was ever supposed to possess. It is true, that there may be some difficulty in ascertaining, in separate actions, the *quantum* of damage done by the dog of each; but this can be no reason why one man should be accountable for mischief done by the dog of another.

I would advise that a new trial be granted. . . .

The other Judges were of the same opinion.

*New trial to be granted.*<sup>1</sup>

MATTHEWS v. THE DELAWARE, LACKAWANNA AND  
WESTERN RAILROAD COMPANY and THE  
NEWARK PASSENGER RAILWAY COMPANY.

SUPREME COURT OF NEW JERSEY. 1893.

[Reported 56 *New Jersey Law*, 34.]

MATTHEWS, the plaintiff, brought an action of tort in the Essex Circuit against the defendants to recover damages for an injury received in a collision between a locomotive of the railroad company and a car (in which he was a passenger) of the railway company.

There was a verdict in favor of the railway company and against the railroad company.

The railroad company obtained a rule to show cause why the verdict against it should not be set aside.

Plaintiff obtained a rule to show cause why the verdict in favor of the railway company should not be set aside.

The rules were consolidated and certified to this court for its advisory opinion.

<sup>1</sup> *Denny v. Correll*, 9 Ind. 72; *Cogswell v. Murphy*, 46 Ia. 44; *State, Nierenberg, Prosecutor v. Wood*, 59 N. J. L. 112, 35 Atl. 654, *accord*. *McAdams v. Sutton*, 24 Oh. St. 333 (statutory), *contra*. Compare *Sadler v. G. W. Ry. Co.*, [1896] A. C. 450 (nuisance); *Munday v. South Metrop. Elec. Light Co.*, (1913) 29 Times Law Rep. 346 (nuisance); *Brose v. Twin Falls Land & Water Co.*, 24 Ida. 266, 133 Pac. 673, 46 L. R. A. (n. s.), 1187 (action against successive owners of land on which nuisance was maintained); *Dickey v. Willis*, 215 Mass. 292, 102 N. E. 336 (deceit); *Strawbridge v. Stern*, 112 Mich. 16, 70 N. W. 331 (conversion); *Chipman v. Palmer*, 77 N. Y. 51 (nuisance); *Little Schuylkill Nav. Co. v. Richards's Administrator*, 57 Pa. 142, 98 Am. Dec. 209; *Swain v. Tennessee Copper Co.*, 111 Tenn. 430, 78 S. W. 93 (nuisance); *Day v. Louisville Coal & Coke Co.*, 60 W. Va. 27, 53 S. E. 776, 10 L. R. A. (n. s.), 167 (nuisance). — ED.



Argued at June Term, 1893, before BEASLEY, CHIEF JUSTICE, and Justices DIXON, MAGIE and GARRISON.

MAGIE, J. Counsel for the railroad company first urges that the verdict finding it to have been negligent was not supported by evidence or was contrary to the weight of evidence.

It is unnecessary to review in detail the case. The discussion of counsel was thorough and exhaustive, and much consideration has been given to the evidence. The conclusion reached is that there was evidence of the neglect of the railroad company to give due notice of the approach of its train sufficient to go to the jury, and although there was much opposing evidence, it did not so preponderate as to require or justify a new trial on this ground.

It is next claimed that the verdict awarded excessive damages. The amount awarded was large, but, considering the proofs of injury, it was not so large as to indicate mistake or misconduct on the part of the jury. The verdict ought not to be disturbed on that ground.

It is lastly contended on behalf of the railroad company that the verdict against it should be set aside because there was no proof of joint negligence on the part of the two defendants.

The claim is, as I understand from the argument, that these defendants cannot be jointly sued for an injury occasioned by such a collision, unless the neglect which caused the collision was of a joint duty owed by both defendants, and that, on failure of proof of a joint duty and joint neglect, neither defendant can be held.

If this contention is sound it is obvious that the declaration was demurrable, for it charged that the railroad company owed to plaintiff a duty to give notice of the passage of its trains across the tracks of the railway company, and that the railway company owed to him a duty to take precautions in carrying him across the tracks of the railroad company, and it averred that each company had neglected to perform the several duties thus charged, and that thereby the collision which injured plaintiff occurred.

But the contention is wholly inadmissible, and the declaration would plainly have been good on demurrer. The error arises out of a misconception as to the nature of a joint tort.

If two or more persons owe to another the same duty, and by their common neglect of that duty he is injured, doubtless the tort is joint, and upon well-settled principles each, any or all of the tort-feasors may be held. But when each of two or more persons owes to another a separate duty which each wrongfully neglects to perform, then, although the duties were diverse and disconnected

and the negligence of each was without concert, if such several neglects concurred and united together in causing injury, the tort is equally joint and the tort-feasors are subject to a like liability.

This doctrine was announced in this court by the Chief Justice in *Newman v. Fowler*, 8 Vroom, 89.

The like doctrine was applied by the Court of Appeals in New York to a case identical with that under consideration. *Colegrove v. New York and New Haven Railroad Co.*, 20 N. Y. 492. That case has been mentioned with approval in *Barrett v. Third Avenue Railway Co.*, 45 N. Y. 628; *Slater v. Mersereau*, 64 Id. 138; *Aretic Fire Insurance Co. v. Austin*, 69 Id. 470; see, also, *Cooper v. Eastern Transportation Co.*, 75 Id. 116. The same view is taken in other courts. *Wabash, St. Louis and Pittsburg Railway Co. v. Shacklet*, 105 Ill. 364; *Transit Co. v. Shacklet*, 119 Id. 232; *Carterville v. Cook*, 129 Id. 152; *Cuddy v. Horn*, 46 Mich. 596. I have not discovered any dissent from this doctrine except in Pennsylvania, the courts of which state, while admitting the general rule, make an exception of cases where the injured party was the passenger of a carrier whose negligence concurred with the negligence of another in producing the injury. The reason of this exception, however, is that those courts adhere to the doctrine of *Thorogood v. Bryan*, 8 C. B. 114, which has always been repudiated in New Jersey, and is now expressly overruled in England. The *Bernina, L. R.*, 12 P. Div. 58; *S. C., L. R.*, 13 App. Cas. 1. The Pennsylvania cases are *Lockhart v. Lichenthaler*, 46 Pa. St. 151; *Carlisle v. Brisbane*, 113 Id. 544; *Dean v. Pennsylvania Railroad Co.*, 129 Id. 514; *Klauder v. McGrath*, 35 Id. 128; *North Penn. Railway Co. v. Mahoney*, 57 Id. 187.

The declaration, therefore, set out a good cause of action against two joint tort-feasors, and there can be no doubt that in such an action one defendant may be held liable alone if the proof justify it.

The verdict against the railroad company should not be disturbed.

The verdict in favor of the railway company is also questioned by the plaintiff.

There was strong evidence of its negligence tending to produce plaintiff's injury, but it was encountered by contradictory evidence. The question was fairly submitted to the jury and no sufficient reason to disturb their verdict appears.

Let the Circuit Court be advised to discharge both rules.<sup>1</sup>

<sup>1</sup> See *Bullock v. London General Omnibus Co.*, [1907] 1 K. B. 264; *Feneff v. Boston & Maine R. R.*, 196 Mass. 575, 82 N. E. 705; *Maumee*

CITY OF PEORIA *et al. v.* SIMPSON.

SUPREME COURT OF ILLINOIS. 1884.

[Reported 110 *Illinois*, 294.]

SCOTT, J.<sup>1</sup> This was an action to recover for personal injuries, and was brought by Robert Simpson, against the city of Peoria and Magnus Densberger. It is averred in the declaration that defendant Densberger was the owner of the premises situated on Water street, in the city of Peoria, at the place where plaintiff was injured; that there was an opening into the cellar or vault in front of the premises, the covering to which constituted a part of the usual sidewalk; that the owner of the premises wrongfully and negligently permitted such opening to be and remain insufficiently and defectively covered, whereby the sidewalk was left in an unsafe condition; and that at that time, and prior thereto, the city was possessed of and had control of the sidewalk in front of the premises, and ought to have kept the same in good repair and safe condition. It is then further averred as a ground for recovery, that both defendants, well knowing the unsafe and dangerous condition of the sidewalk, wrongfully and negligently suffered the covering to such opening to remain in an insecure and unsafe condition, so that while plaintiff was passing over the sidewalk, in the observance of due care, it broke, and he fell through the opening, into the cellar or vault, and thereby sustained severe injuries, by which he became paralyzed in his back and arm. The declaration contains the usual averments as to the expenditure of large sums of money in the endeavor to be healed and cured. The second count contains an averment the covering to the opening was dangerous at the time the owner let the premises to the occupying tenant, and the condition of the covering at the time rendered the sidewalk dangerous, and that defendants had notice of its dangerous condition.

Valley, *etc.*, *Co. v. Montgomery*, 81 Oh. St. 426, 91 N. E. 181, 26 L. R. A. (N. s.), 987.

As to joinder of principal and agent in an action of tort, see *Parsons v. Winchell*, 5 Cush. (Mass.), 592, 52 Am. Dec. 745; *Hewett v. Swift*, 3 Allen (Mass.), 420; *Mayberry v. Northern Pac. Ry. Co.*, 100 Minn. 79, 110 N. W. 356, 12 L. R. A. (N. s.), 675, 10 Ann. Cas. 754; *French v. Central Construction Co.*, 76 Oh. St. 509, 81 N. E. 751, 12 L. R. A. (N. s.), 669; *Dicey, Parties*, pp. 441, 465; *Cooley, Torts*, 3d ed., p. 241. — Ed.

<sup>1</sup> A part of the opinion is omitted. The judgment was reversed and the cause remanded for a new trial because of erroneous instructions. — Ed.

The amended declaration contains an averment the opening was covered with a wooden door, of a height and length prohibited by an ordinance of the city, and that such doors were at the time, and prior thereto had been, a nuisance, and that the city had notice thereof. Separate demurrers filed by each defendant were overruled by the court, and thereupon pleas of not guilty were filed by each defendant. A trial was had before a jury, who returned a verdict finding the issues for plaintiff, and assessing his damages at \$6000. Motions for a new trial and in arrest of judgment were severally overruled, and the court entered judgment on the verdict. That judgment was afterwards affirmed in the Appellate Court for the Second District. The case comes to this court on the appeal of the city of Peoria, and since then defendant Densberger has also assigned errors on the same record. . . .

A question not entirely free from doubt is, can the owner of the premises and the city be held jointly liable for the injuries to plaintiff in the same action. It is said this question cannot now be considered, for the reason defendants did not stand by their demurrers, the rule being familiar that a party may not at the same time plead and demur to the same pleading. It is also true any substantial defect in a declaration can always be taken advantage of by a motion in arrest of judgment, and that was done in this case.

It will be observed both defendants are charged with negligence as to the condition of the sidewalk that occasioned the injury to plaintiff, and why may they not be jointly liable in the same action? The owner is liable, if at all, because the premises were let with the nuisance upon them, and that liability, if any existed, continued, notwithstanding the possession of the tenant, and continued up to the time of the accident. On the hypothesis the city had notice, it was the duty of the municipal authorities to make repairs at and before the injury to plaintiff. The same duty rested upon the owner and the municipality, at the same time, to make such repairs, and both may therefore be said to be guilty of negligence in respect to the same thing. Had the action been brought against the owner and the tenant, no doubt it could have been maintained had it been averred and proved both were under obligations to make repairs, and both were guilty of negligence in that respect. The averment is, it was the duty of both the owner and the municipality to repair the sidewalk, and both are charged with the omission of a common duty in that regard, — and what reason is there why they may not be joined in the same action? Undoubtedly the rule is, for separate acts of trespass separately done,



or for positive acts negligently done, although a single injury is inflicted, the parties can not be jointly held liable to the party injured. If there is no concert of action — no common intent — there is no joint liability. This rule is very well settled by authority: *Hilliard on Torts*, sec. 10, p. 315; *Nav. Railroad and Coal Co. v. Richards*, 57 Pa. St. 142; *Shearman & Redfield on Negligence*, 58; *Bard v. Yohn*, 26 Pa. St. 482.

But a different principle applies where the injury is the result of a neglect to perform a common duty resting on two or more persons, although there may be no concert of action between them. In such cases the party injured may have his election to sue all parties owing the common duty, or each separately, treating the liability as joint or separate. A familiar case illustrating the principle is, where a person is injured by the falling of a party wall erected on the dividing line between two lots owned by different persons, the action is maintainable jointly against both owners. It is for the reason it was a common duty of both owners to make the repairs. Another instance is, where a passenger is injured by a negligent collision of the trains of two railroad companies, he may maintain one action against both. And so it has been held an action may be maintained jointly against towns, where the law will authorize such an action, for an injury resulting from the insufficiency of a bridge which both towns are under an obligation to maintain. *Klauder v. McGrath*, 36 Pa. St. 128; *Colegrove v. N. Y., B. N. and N. H. R. R. Co.*, 6 Duer, 382; *Same v. Same*, 6 Smith (N. Y.), 492; *Peckham v. Burlington*, 1 Vt. 34. In *Bryant v. Bigelow Carpet Co.*, 1 Mass. 491, it was held, where the negligent acts of two defendants combined to produce the injury to plaintiff, a joint action could be maintained against both negligent parties.

It will be seen the rule recognized rests on sound principle, — that is, where an injury results from the concurrent negligence of several persons, all being under a common duty to observe care, though that duty is separate with reference to that which causes the injury, all are jointly liable. Applying this principle to the case being considered, it would seem to be conclusive as to the point made, the city and the owner are not jointly liable for the injury to plaintiff. If it shall be ascertained it was the duty of both the owner and the city to keep the sidewalk in repair, then the failure to do so was a common neglect, and the case comes precisely within the principle stated. Whether both or either party was under such duty, depends on facts to be found by the jury in the trial court.

As respects the point suggested whether the city could recover against the owner in case it was compelled to pay the judgment, is a question that does not affect the principle being considered. How the law may be on that subject need not now be determined. It is a question in which plaintiff can have no interest. As was said in *Bryant v. Bigelow Carpet Co.*, *supra*, the question of their relative rights and liabilities will be left to future litigation or adjustment between defendants. It is enough that it appears both defendants may have been guilty of negligence in regard to that which caused the injury to plaintiff, to enable him to maintain his action against them jointly. . . .

*Judgment reversed.*<sup>1</sup>

SUMNER v. TILESTON *et al.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1826.

[Reported 4 *Pickering*, 308.]

THIS was an action of the case against E. Tileston, M. Hollingsworth and A. Fuller. The declaration alleged that the defendants wrongfully did erect "a certain dam" in and across Neponset river and "did shorten and heighten their said dam," by means whereof the water was penned up so as to flow back and obstruct the wheels of the plaintiff's mills.

The defendants pleaded jointly the general issue and the statute of limitations. At an adjourned session of this Court in June 1826, Tileston and Hollingsworth pleaded in abatement the death of Fuller since the adjournment in February preceding; to which plea the plaintiff demurred.

PUTNAM, J., delivered the opinion of the Court. It seems to be settled, that where only one tenant in common of real estate is

<sup>1</sup> *Kansas City v. File*, 60 Kan. 157, 55 Pac. 877 (action against electric light company and city); *Fortmeyer v. National Biscuit Co.*, 116 Minn. 158, 133 N. W. 461, 37 L. R. A. (N. S.), 569 (action against lessor, lessee and city), *accord*. But see *Mooney v. Edison Electric Illuminating Co.*, 185 Mass. 547, 70 N. E. 933 (action against electric light company and street railway for violation of common law duty and against city for violation of statutory duty); *Village of Mineral City v. Gilbow*, 81 Oh. St. 263, 90 N. E. 800, 25 L. R. A. (N. S.), 627 (action against land owner and village); *Dutton v. Lansdowne Borough*, 198 Pa. 563, 48 Atl. 494, 53 L. R. A. 469, 82 Am. St. Rep. 814 (action against land owner and borough).

It is not necessary to join all who owe the duty to the plaintiff. *City of Topeka v. Sherwood*, 39 Kan. 690, 18 Pac. 933. — ED.

sued in trespass for anything done in regard to the estate in common, he may plead that matter in abatement, 1 Chit. Pl. 71, 6th Amer. ed., 95, 96, 100; and the counsel for the defendants contend that this rule applies to the case at bar. We think however that it should appear from the pleadings, that the defendants were charged by reason of their holding certain real estate as joint tenants or tenants in common. In the case cited from 7 H. 4. 8. the defendant, the abbot of Stratford, was sued for not repairing a wall upon the bank of the Thames, which he ought to have repaired *by reason of his holding certain land*, for the default of reparation whereof the lands of the plaintiff were overflowed. But in the case at bar it does not appear that the defendants are charged as tenants in common or as joint tenants. The plaintiff declares that they have wrongfully prevented the water from running off from his mills, by making a dam below across the river, and to this the defendants plead the general issue. It does not appear that their defence depended upon the title to the land where the plaintiff alleges that they built the dam, and it may turn out on the trial, that they defend on the ground that they never did the act of which the plaintiff complains. The plaintiff charges them as wrongdoers. The action is merely *ex delicto*, and the title of the defendants would not be affected by a verdict upon the issue.

The plea in abatement states that one of the defendants died after the adjournment from February and before the sittings in June. Now that fact is immaterial, because in actions for torts the plea of the general issue by many defendants is in its legal effect several. One only or more may be convicted and the rest acquitted or they may be all convicted or all acquitted. See Chitty's Pl., 6th Amer. ed., 99. We are of opinion that the death of one under these circumstances is not a sufficient cause to prevent the plaintiff from proceeding against the others. See Revised Stat., c. 93, § 12.

*Respondeas ouster.*<sup>1</sup>

<sup>1</sup> See *Low v. Mumford*, 14 Johns. (N. Y.), 426; 1 Wms. Saund. 291 f and g; Dickey, Parties, p. 438.

As to non-joinder of defendants when the tort is connected with a contract, see 1 Wms. Saund, 291 e and f; Dickey, Parties, p. 437. As to actions against common carriers, inn-keepers, etc., founded on the custom of the realm, see *Boulston v. Sandiford*, Skin. 278. — Ed.

## RULES OF THE SUPREME COURT, 1883 (England), Order XVI.

RULE 1.<sup>1</sup> All persons may be joined in one action as plaintiffs, in whom any right to relief [in respect of or arising out of the same transaction or series of transactions] is alleged to exist, whether jointly, severally, or in the alternative, [where if such persons brought separate actions any common question of law or fact would arise; provided that, if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, the Court or a Judge may order separate trials, or make such other order as may be expedient], and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief unless the Court or a Judge in disposing of the costs shall otherwise direct.

RULE 2. Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a Judge may, if satisfied that it has been so commenced through a *bonâ-fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just.

RULE 3. Where in an action any person has been improperly or unnecessarily joined as a co-plaintiff, and a defendant has set up a counterclaim or set off, he may obtain the benefit thereof by establishing his set-off or counterclaim as against the parties other than the co-plaintiff so joined, notwithstanding the misjoinder of such plaintiff or any proceeding consequent thereon.

RULE 4. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.

RULE 5. It shall not be necessary that every defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the Court or a Judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being

<sup>1</sup> The words included within the brackets formed no part of the rule until 1896.



required to attend any proceedings in which he may have no interest.

RULE 6. The plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally liable on any one contract, including parties to bills of exchange and promissory notes.

RULE 7. Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as herein-after mentioned, or as may be prescribed by any special order, join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties.

RULE 8. Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the Court or a Judge may, at any stage of the proceedings, order any of such persons to be made parties, either in addition to or in lieu of the previously existing parties.

[This rule shall apply to trustees, executors and administrators, sued in proceedings to enforce a security by foreclosure or otherwise.]

RULE 9. Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a Judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested.

RULE 11. No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend, or as

the next friend of a plaintiff under any disability, without his own consent in writing thereto. Every party whose name is so added as defendant shall be served with a writ of summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against such party shall be deemed to have begun only on the service of such writ or notice.

RULE 12. Any application to add or strike out or substitute a plaintiff or defendant may be made to the Court or a Judge at any time before trial by motion or summons, or at the trial of the action in a summary manner.

RULE 13. Where a defendant is added or substituted, the plaintiff shall, unless otherwise ordered by the Court or a Judge, file an amended copy of and sue out a writ of summons, and serve such new defendant with such writ or notice in lieu of service thereof in the same manner as original defendants are served.

#### OHIO GENERAL CODE.

SEC. 11241 (25, 26).<sup>1</sup> An action must be prosecuted in the name of the real party in interest, except as provided in the next three succeeding sections.<sup>2</sup> When a party asks that he may recover by virtue of an assignment, the right of set-off, counterclaim and defense, as allowed by law, shall not be impaired.

SEC. 11244 (27). An executor, administrator, or guardian, a trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law.

SEC. 11254 (34). All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs except as otherwise provided.

SEC. 11255 (35). Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of a question involved therein.

SEC. 11256 (36). Parties who are united in interest must be joined, as plaintiffs or defendants. If the consent of one who

<sup>1</sup> The figures in parentheses are the section numbers of the Ohio Code of Procedure as originally adopted.

<sup>2</sup> The next two succeeding sections relate to suits on forfeited bonds.

should be joined as plaintiff cannot be obtained, or, he is insane, and the consent of his guardian is not obtainable, or he has no guardian, and that fact is stated in the petition, he may be made a defendant.

SEC. 11257 (37). When the question is one of a common or general interest of many persons, or the parties are very numerous, and [it] is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

SEC. 11258 (38). One or more of the persons severally liable on an instrument may be included in the same action thereon.

SEC. 11259. Parties to a written instrument by initial letter, or a contraction of the name, may be so designated in an action thereon.

SEC. 11260. A partnership formed for the purpose of carrying on a trade or business in this state, or holding property therein, may sue or be sued by the usual or ordinary name which it has assumed, or by which it is known. In such case it shall not be necessary to allege or prove the names of its individual members.

SEC. 11262 (40). The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights. When such determination cannot be had without the presence of other parties, the court may order them to be brought in, or dismiss the action without prejudice.

SEC. 11263 (41). In an action for the recovery of real or personal property, a person claiming an interest in the property, on his application, may be made a party.

SEC. 11583 (371). Judgment may be given for or against one or more of several plaintiffs and for or against one or more of several defendants. By the judgment, the court may determine the final rights of the parties on either side, as between themselves, and grant to the defendant any affirmative relief to which he is entitled.

SEC. 11584 (371). In an action against several defendants, the court may render judgment against one or more of them, leaving the action to proceed against the others, whenever a several action is proper.

THE NEW JERSEY PRACTICE ACT (1912).<sup>1</sup>

4. Subject to rules,<sup>2</sup> all persons claiming an interest in the subject of the action and in obtaining the judgment demanded, either jointly, severally or in the alternative, may join as plaintiffs, except as otherwise herein provided. And persons interested in separate causes of action may join if the causes of action have a common question of law or fact and arose out of the same transaction or series of transactions.

5. If one who may join as plaintiff declines to do so, he may be made a defendant, the reason therefor being stated in the complaint.

6. Subject to rules,<sup>3</sup> any person may be made a defendant, who, either jointly, severally or in the alternative, is alleged to have or claim an interest in the controversy, or in any part thereof, adverse to the plaintiff, or whom it is necessary to make a party for the complete determination or settlement of any question involved therein.

The plaintiff may join separate causes of action against several defendants if the causes of action have a common question of law or fact and arose out of the same transaction or series of transactions.

7. An executor, administrator, or trustee, of an express trust (including one with whom a contract is made for the benefit of another) may sue or be sued without joining the person beneficially interested in the suit.

8. The court may determine the controversy as between the parties before it, where it can do so without prejudice to the rights

<sup>1</sup> N. J. Pamph. L. 1912, p. 378.

<sup>2</sup> Rule 6 in the schedule attached to the Act provides that "In suits on a joint contract, whether partnership or otherwise, the personal representatives of a deceased co-contractor may join, as plaintiffs, and be joined, as defendants, with the survivors or survivor; *provided*, that where the estate of the decedent is in settlement in this State, as an insolvent estate, his personal representatives cannot be joined as defendants." — Ed.

<sup>3</sup> Rule 7 provides that "Persons severally and immediately liable on the same obligation or instrument, including parties to bills of exchange and promissory notes; also indorsers, guarantors, and sureties, whether on the same or by a separate instrument, may all, or any of them, be joined as defendants, and a joint judgment may be rendered against those so joined. . . ."

Rule 8 provides that "Persons may be joined as defendants against whom the right to relief is alleged to exist in the alternative, although a right to relief against one may be inconsistent with a right to relief against the other." — Ed.



of others; but where a complete termination cannot be had without the presence of other parties, the court may direct them to be brought in. Where a person, not a party, has an interest or title which the judgment will affect, the court, on his application, shall direct him to be made a party.

9. No action shall be defeated by the non-joinder or misjoinder of parties. New parties may be added and parties misjoined may be dropped, by order of the court, at any stage of the cause, as the ends of justice may require.

10. No change in parties, made by order of court, shall impair any previous attachment of the estate or body of any person remaining a defendant in the action; nor impair bonds or recognizances of any person remaining a party, either as against himself or his sureties; nor impair receipts to an officer for property attached; and, when parties are changed, the court may order new bonds if such new bonds are deemed necessary. Orders of court concerning change in parties may be upon terms at the discretion of the court.

## CHAPTER VI.

### PLEADING.

#### SECTION I.

##### *Demurrers.*

[*Form of General Demurrer.*] <sup>1</sup>

IN the.....Court of the County of....., State of.....  
C. D. } And the defendant by X. Y., his attorney, says that the  
ats. } said declaration [or the said.....count of the said dec-  
A. B. } laration] is not sufficient in law.  
X. Y., Attorney for Defendant.

MOORE *v.* HOBBS and BUSH.

SUPREME COURT OF NORTH CAROLINA. 1878.

[Reported 79 *North Carolina*, 535.]

CIVIL ACTION tried at Spring Term, 1878, of CHOWAN Superior Court, before *Furches, J.*

The plaintiff complains: —

1. That the defendants are indebted to him in the sum of \$488.70 at eight per cent interest per annum from the 1st day of December, 1875.

2. That no part of said debt has been paid.

3. Therefore the plaintiff demands judgment against the defendants (for said sum) and costs.

The defendants demur: —

Because the facts stated in said complaint are insufficient to constitute a cause of action, in that, it does not contain a plain and concise statement of the facts constituting the plaintiff's cause of action.

<sup>1</sup> The following is a form of joinder in demurrer (now generally dispensed with):

“ (*Title of cause.*)

“ The plaintiff says that the declaration is sufficient.”

For the more complex forms formerly in use, see Tidd, *Forms*, 4th ed., 270.  
— ED.

The Court overruled the demurrer and offered to allow the defendants to answer, which they refused to do. Thereupon judgment was rendered upon the complaint in favor of the plaintiff for the sum demanded, and the defendants appealed.

READE, J.<sup>1</sup> "A declaration is a specification in a methodical and legal form of the circumstances which constitute the plaintiff's cause of action." 1 Chitty, Pl., 240. Observe, that it is not to state that there is a cause of action, but the "circumstances" which constitute the cause of action. "The general requisites or qualities of a declaration are, . . . Second, that it contain a statement of all the facts necessary in point of law to sustain the action, and no more; third, that these circumstances be set forth with certainty and truth." 1 Chitty, Pl., 244. Observe again, that "all the facts" are to be set forth. If a declaration in debt be upon simple contract, the consideration must be set forth with the other facts. If it be upon a specialty, the specialty must be set forth, and that imports a consideration. Chitty, Pl., 362, 363. The form of a declaration on simple contract is as follows: A. B., the plaintiff in this suit . . . complains of C. D., the defendant, in this suit . . . for that, whereas the defendant on — was indebted to the plaintiff in \$— for the price and value of goods then sold and delivered by the plaintiff to the defendant at his request, &c., or for the price and value of work then done, &c., or for money lent, &c. Arch. N. P., 297. The form of a declaration on specialty is as follows: — A. B., the plaintiff, &c., complains, &c. Whereas, the defendant, &c., by his certain writing obligatory sealed with his seal, and now shown to the Court, &c., acknowledged himself to be held and firmly bound unto the plaintiff in the sum of \$—, &c. Arch. N. P., 304. A defect in the declaration appearing on the face of it could be taken advantage of by demurrer.

It is plain therefore that under the former mode of pleading, the declaration in this case is fatally defective. It states a cause of action, viz., indebtedness: but it states not one single "circumstance" or "fact" constituting the cause. But then it is said, "that all the forms of pleading heretofore existing are abolished." C. C. P., § 91. True, but still, all form is not abolished, for the same C. C. P., §§ 91, 92, prescribes, "that the complaint shall contain a plain and concise statement of the facts constituting the cause of action without unnecessary repetition, and each material allegation shall be distinctly numbered."

<sup>1</sup> A part of the opinion is omitted. — Ed.

Observe, that in the new, as in the old form, the facts constituting the cause of action must be stated, with this addition in the new over the old, that each material fact shall be separately numbered. The object of the declaration in the old forms was to inform the defendant fully as to the facts, so that he might make his defence both by the proper pleas and by proofs, and that the jury and the Court might see what they had to try and to decide. This was not a matter of mere form, but of substance. And there has been no relaxation of the requisite in the new form, and no alteration from the old, except to require the greater particularity of separately numbering every material fact. Why require them to be numbered if they are not required to be stated?

There is not in this case a single fact stated to show whether the complaint is on a simple contract for goods sold and delivered, or for work and labor, or for money lent, or for any like matter, or whether it is upon a bond or other specialty, or whether it be not for some alleged tort. . . .

Reversed and remanded; the plaintiff to pay, and the defendants to recover costs in this Court.

PER CURIAM.

*Judgment accordingly.*<sup>1</sup>

EICHLIN *et ux.* v. THE HOLLAND TRAMWAY  
COMPANY *et al.*

SUPREME COURT OF NEW JERSEY. 1902.

[Reported 68 *New Jersey Law*, 78.]

ON demurrer to *narr.*

Before GUMMERE, CHIEF JUSTICE, and Justices VAN SYCKEL, GARRISON and GARRETSON.

GARRISON, J. The demurrer filed to the declaration cannot be sustained. That pleading is, it is true, redundant to the point of embarrassing the issue, but inasmuch as it sets out a cause of action it is good upon general demurrer. The gist of the action shown is that the defendants maintained in the highway things that were at once a public nuisance, and the actual cause of private injury of a physical nature to the plaintiffs.

<sup>1</sup> Even under the codes in many jurisdictions, a complaint alleging simply an indebtedness for goods sold, money paid, etc., analogous to a declaration at common law on the common counts, is good. *Allen v. Patterson*, 7 N. Y. 476. But see *Bowen v. Emmerson*, 3 Ore. 452. See Ames, *Cases on Pleading*, ed. of 1905, 314; Pomeroy, *Code Remedies*, 4th ed., p. 584. — ED.



This answers all of the causes assigned for demurrer that have any substance.

Judgment upon demurrer is given for the plaintiffs.<sup>1</sup>

# HARTFORD BANK v. GREEN, THOMAS & CO.

SUPREME COURT OF IOWA. 1861.

[Reported 11 *Iowa*, 476.]

BALDWIN, J.<sup>2</sup> The plaintiff seeks to recover of Key, Foster, *et al.*, as makers, and of Green, Thomas & Co., as indorsers, of a promissory note which reads as follows:

BURLINGTON, Dec. 5th, 1857.

Twelve months after date we promise to pay to the order of Green, Thomas & Co., one thousand dollars currency, value received with ten per cent interest after maturity.

(Signed)

CHARLES FOSTER,

A. KEY, and others.

(Indorsed)

GREEN, THOMAS & Co.

In order to show such diligence against the makers as to charge the indorsers, the plaintiff in the petition alleges that the defendants by their said undertaking agreed to pay said note at the city of Burlington, at the maturity thereof. It is further averred that when said note became due, "it was duly presented for payment at the Banking House of Coolbaugh & Brooks, in said city, and notice of non-payment given to the makers thereof by notices deposited in the post-office of said city; that none of the makers thereof could be found in said city to whom said note could be presented for payment; nor had any of said makers any known place of residence in said city, diligent inquiry having been made to ascertain the same." Copies of the note and the protests are annexed to and made a part of the petition.

The note is dated at Burlington, but is not made payable at any particular place. The defendants, Green, Thomas & Co., de-

<sup>1</sup> See *Tucker v. Randall*, 2 Mass. 283.

In *Bean v. Ayers*, 67 Me. 482, p. 488, the court said: "A demurrer complains of too little and not too much matter in a declaration. The maxim *utile per inutile non vitatur* applies. The remedy may be to move to strike out or reduce useless and redundant allegations. Upon inspection, the court may order it to be done." — Ed.

<sup>2</sup> A part of the opinion is omitted. — Ed.

murred to this petition, alleging as a cause therefor, a variance between the note described in the petition and the copy annexed thereto. This being sustained the plaintiff appeals.

It is claimed by the appellants that as the petition charges that the note was made payable at the city of Burlington, the defendants by their demurrer admit the truth of the allegation thus made, and are estopped thereby from saying that the note was not properly presented so as to charge the indorsers.

A demurrer only admits such facts to be true as are well pleaded. The plaintiffs in order to recover as against the indorsers must show due diligence against the makers. The plaintiff in the petition sets forth the diligence used, and the note being made payable at no particular place it was therefore payable at the residence or place of business of the makers. The diligence used becomes a question of law, and if all the diligence used by the holder is set out in the petition it can be determined upon demurrer as well as otherwise whether the indorsers are liable or not. The copy of the note contradicts the allegation in the petition, that it was made payable in the city of Burlington. No place of payment is designated in the note; nor is it alleged that there was any subsequent agreement between the parties that it should be paid in said city. In the absence of any place being designated where the same is payable, the law fixes such place at the residence, or place of business, of the makers. The plaintiff does not show that such place of residence was not within the state or unknown to the holder. It barely shows that it could not be found in the city of Burlington, and that the inquiry was confined to that place alone; and none even was made of the indorsers thereon who were residents of said city. . . .

*Judgment affirmed.*<sup>1</sup>

FIRST NATIONAL BANK OF ANOKA *v.* ST. CROIX  
BOOM CORPORATION.

SUPREME COURT OF MINNESOTA. 1889.

[Reported 41 *Minnesota*, 141.]

APPEAL by defendant from an order of the municipal court of Stillwater, overruling its demurrer to the complaint in an action for the conversion of 17,000 feet of logs of the value of \$136.

*By the Court.* The only allegation in the complaint as to plaintiff's right to or interest in the property alleged to have been wrong-

<sup>1</sup> As to repugnancy in immaterial allegations, see Stephen, Pleading, Will. ed., \*414. — ED.

fully converted is "that the plaintiff, in the regular course of business, and to effect the payment of money already loaned and a debt owing, took an assignment of the logs marked F. D. A., and of the logs bearing said marks, on or about the 9th of February, 1884, and then and thereby became, and ever since has continued to be, the owner of all the logs bearing said mark." The pleader might have contented himself with a general allegation of ownership, but he has attempted to set out all the facts by which the plaintiff became the owner, and then the general result following from those facts. In such a form of pleading the particular facts alleged will control, and, if they do not sustain the result reached, the pleading is bad. *Pinney v. Fridley*, 9 Minn. 23, (34.) In this case there are no facts alleged to support the conclusion that the plaintiff became the owner of the logs. It is not alleged by whom or to whom the money was loaned or the debt was owing, or from whom the assignment was taken, or that the party from whom taken had any interest in the logs. In fact it would appear that the pleader had studiously avoided alleging any material fact. The complaint, therefore, did not state a cause of action.

The second objection to the complaint, viz., that it does not state the particular acts constituting the alleged conversion, is not well taken. This is not necessary. A general allegation that the defendant has wrongfully converted the property is sufficient; but on the first ground the demurrer should have been sustained.

*Order reversed.*<sup>1</sup>

### LYDECKER *v.* ST. PAUL CITY RAILWAY COMPANY.

SUPREME COURT OF MINNESOTA. 1895.

[Reported 61 *Minnesota*, 414.]

APPEAL by plaintiff from an order of the district court for Ramsey county, Brill, J., sustaining a demurrer to the complaint. Affirmed.

The complaint alleged in substance that plaintiff was a passenger on defendant's electric street car; that on approaching the cross street where he wished to alight, he notified the conductor, who signalled the motorman to stop; that in consequence, and for the purpose of stopping on the farther side of said street, the motor-

<sup>1</sup> *Baumler v. Narragansett Brewing Co.*, 23 R. I. 430, 50 Atl. 841, *accord* — Ed.

man reduced the speed of the car; that at a point in the middle of said street and while the car was running at a low rate of speed, to-wit, at a speed safe for a passenger to step from the same and not exceeding two miles an hour, plaintiff stepped from the car and started to pass around the rear end, and without expecting or looking for a car on the other track, by reason of the facts above stated, started directly to cross the other track; that as he was in the act of stepping thereon a car from the opposite direction, running at the rate of six miles an hour, struck and injured plaintiff; that he heard no bell rung from said car, and that plaintiff received said injury solely by reason of said carelessness and negligence of defendant.

MITCHELL, J. It is clear from the most casual inspection of the complaint that it does not state a cause of action. No act of negligence on part of defendant is alleged. It is alleged that the car which struck the plaintiff was running at the rate of six miles an hour; also that plaintiff heard no bell rung on the car; but there is no allegation that six miles an hour was an improper or unlawful rate of speed, or that no bell was in fact rung.

Counsel for defendant ask us to further hold that the complaint is insufficient because it affirmatively appears that plaintiff himself was guilty of contributory negligence. We cannot so hold. Contributory negligence is a matter of defense. Hence the question is not whether plaintiff has sufficiently negatived his own negligence, but whether it conclusively appears, as a matter of law, from the facts stated in his complaint, that he was guilty of contributory negligence. While the admissions in the complaint may point very strongly to negligence on part of the plaintiff, yet we do not think they come up to the required test. The question may become a question of law after the evidence is all in, but it is not such on the pleadings.

*Order affirmed.*<sup>1</sup>

<sup>1</sup> See *Town of Salem v. Goller*, 76 Ind. 291.

In *Chesapeake & Ohio Ry. Co. v. Swartz*, 115 Va. 723, p. 729, 80 S. E. 568, the court said "Assumption of risk and contributory negligence are matters of defense, and the fact that a plaintiff has not assumed the one or been guilty of the other need not be averred. It is nevertheless true that where a declaration shows that the plaintiff has assumed the risk, or been guilty of contributory negligence, it will be held bad on demurrer."

In jurisdictions which require the plaintiff in his declaration to allege his own due care, a failure to make such an allegation of course renders the declaration demurrable.

A declaration which discloses on its face the defense of accord and satisfaction is demurrable. *Paulson v. Ward County*, 23 N. D. 601, 137 N. W. 486, 42 L. R. A. (N.S.), 111. — Ed.



TROTTER *et al.* v. MUTUAL RESERVE FUND LIFE  
ASS'N *et al.*

SUPREME COURT OF SOUTH DAKOTA. 1897.

[Reported 9 *South Dakota*, 596.]

ACTION to recover on a policy of life insurance. Defendants' demurrer to the complaint was overruled, and they appeal.

*Affirmed.*

The plaintiffs, as the next of kin of the insured, bring this action, alleging that the policy sued on was executed by the defendant company, that the other defendant, the administrator of the insured, released the defendant company, but that the release was procured by the fraud of the defendant company and of the administrator, and that the administrator refused to sue the defendant company. The defendant company demurs to the complaint on the ground that it does not state facts sufficient to constitute a cause of action.<sup>1</sup>

Haney, J. . . . The release is a matter of defense, which should not have been mentioned in the complaint. The allegations relating thereto must be construed together, and, if stated in an answer, would certainly constitute no bar to plaintiffs' recovery. They do not defeat plaintiffs' right of action. They are inoperative and useless, and should be disregarded as surplusage. Phil. Code Pl. § 133. Without them we have a debt due the estate of \$5000, upon which the administrator refuses to bring suit. We think the complaint states a cause of action, and that the order overruling the demurrer should be affirmed. It is so ordered.

WALL, Admx., v. THE CHESAPEAKE AND OHIO  
RAILROAD COMPANY.

SUPREME COURT OF ILLINOIS. 1902.

[Reported 200 *Illinois*, 66.]

WILKIN, J.<sup>2</sup> This suit was begun by plaintiff in error to recover damages for occasioning the death of her intestate, as it is alleged, by reason of the negligence of the defendant in error. To a second amended declaration containing twelve counts, filed on January 5,

<sup>1</sup> The statement of facts is taken from the opinion and is abridged, and a part of the opinion, together with the dissenting opinion of Fuller, J., is omitted. — Ed.

<sup>2</sup> A part of the opinion is omitted. — Ed.

1900, the court sustained a general demurrer, and plaintiff having elected to stand by her declaration as amended, and judgment for costs having been rendered against her, she appealed to the Appellate Court for the First District, where the judgment below was affirmed, and the case is brought to this court upon writ of error.

The question is one of pleading. Plaintiff in error insists that the court erred in sustaining the demurrer. The first four counts of the declaration are alike, except the allegations as to the place where the injury was received, and they allege, in substance, that the deceased, on May 24, 1896, while accompanying a train carrying live stock and passing through the city of Cincinnati, and while he was riding on the top of one of the cars, there being no safe place provided by the company for him to ride, was struck by a bridge or viaduct which crossed over the track and was greatly injured, resulting in his death. The negligence averred is, that the defendant failed to furnish him a safe place in which to ride while caring for the live stock, and failed to warn him of the danger he incurred in so riding in the place provided for him to ride, namely, on the top of the cars.

From the face of the declaration it appears that more than two years elapsed from the time of the injury to the bringing of the suit, and it is insisted by defendant in error that therefore the action could not be sustained, and hence the defense of the Statute of Limitations could be made by demurrer. Mainly on this ground it is insisted the trial court properly sustained the demurrer. In equity, where it appears on the face of the bill that the cause of action is barred by *laches* or the Statutes of Limitations, the defect may be reached by demurrer to the bill. But the rule is otherwise in common law pleading. The defendant cannot demur to a declaration even where it appears on its face that the limitation prescribed by the statute has expired, because the plaintiff would thus be deprived of the opportunity of replying and pleading any matter which would prevent the bar from attaching. The defendant must plead the statute if he wishes to avail himself of it. *Gunton v. Hughes*, 181 Ill. 132. The demurrer to the first four counts was therefore improperly sustained. . . .

*Reversed and remanded.* <sup>1</sup>

<sup>1</sup> See Ames, Cases on Pleading, ed. of 1905, pp. 128-132; Pomeroy, Code Remedies, 4th ed., p. 818. — Ed.

CHAMBERS *v.* LATHROP.

SUPREME COURT OF IOWA. 1841.

[Reported *Morris*, 102.]

BY THE COURT, MASON, CHIEF JUSTICE.<sup>1</sup> The declaration in this case consisted of two counts, to which there was a general demurrer. This being overruled, judgment was rendered for the plaintiff, for seventy-five dollars, and costs, without the intervention of a jury.

It is assigned for error, in the first place, that the demurrer should have been sustained. If either count of the declaration was good, the demurrer was properly overruled. Although neither of the counts seem drawn up with much professional accuracy, and although the first is doubtless defective, the second appears sufficient in substance to sustain the judgment already rendered. . . .

*The judgment below will therefore be affirmed.*<sup>2</sup>

GHIRADELLI *v.* GREENE, County Judge of Alameda County.

SUPREME COURT OF CALIFORNIA. 1880.

[Reported 56 *California*, 629.]

SHARPSTEIN, J.<sup>3</sup> An action was originally brought in a Justice's Court by A. C. Dietz, plaintiff, against Ghiradelli, and others, defendants, to recover rent alleged to be due upon a lease in writing.

<sup>1</sup> The statement of facts and a part of the opinion are omitted. — ED.

<sup>2</sup> See Ames, *Cases on Pleading*, ed. of 1905, 23; 1 Chitty, *Pleading*, 16th Am. ed., \*696; 6 *Encyc. of Pl. & Pr.* 301.

The same result has been reached where a single demurrer has been interposed to several pleas. *Stacy v. Baker*, 1 Scam. (Ill.), 417; *Farmers and Merchants' Ins. Co. v. Menz*, 63 Ill. 116 (set-off); *Webb v. Bowless*, 15 Ind. 242; *Gregory v. Gregory*, 89 Ind. 345 (set-off); *Hudson v. Inhabitants of Winslow*, 35 N. J. L. 437; *Mercein v. Smith*, 2 Hill (N. Y.), 210 (set-off).

A demurrer to the declaration and the several counts therein contained is treated as a demurrer to each count and will be sustained as to any defective counts and overruled as to counts which are not defective. *May v. Western Union Tel. Co.*, 112 Mass. 90.

In some jurisdictions the demurrer to several counts or pleas is taken distributively, and is sustained as to the bad, and overruled as to the good, counts or pleas. *Gearhart v. Olmstead*, 7 Dana (Ky.), 441; *Tittle v. Bonner*, 53 Miss. 587. See *South Eastern Ry. Co. v. Railway Commissioners*, 6 Q. B. D. 586 — ED.

<sup>3</sup> A part of the opinion is omitted. — ED.

Judgment was rendered against them, and they appealed to the Superior Court, which affirmed the judgment of the Justice's Court. The proceedings of the Superior Court have been brought before us upon a writ of review, sued out by the defendants.

The defendants demurred to the complaint in the Justice's Court, on the ground that a copy of it had not been served upon them with the summons. Their counsel insists that this constituted a ground of demurrer, because the Court could not acquire jurisdiction of the defendants without the service of a copy of complaint, with the summons. But the omission would not appear upon the face of the complaint, which was filed before the service or even issuance of the summons, and therefore the objection could not be taken by demurrer. Code Civ. Proc. § 423. The demurrer on that ground was properly overruled, and the answer of the defendants to the complaint was a voluntary appearance by them, which was equivalent to personal service of the summons and copy of the complaint upon them. Code Civ. Proc. § 416; id. § 1014. . . .

*Affirmed.*

MORRISON, C. J., ROSS, J., MCKINSTRY, J., and MYRICK, J., concurred.

## HUDSON, &c., v. SCOTTISH UNION & NATIONAL INSURANCE CO.

COURT OF APPEALS OF KENTUCKY. 1901.

[Reported 110 *Kentucky*, 722.]

GUFFY, J.<sup>1</sup> The plaintiffs instituted this action against the defendant in the Boyle Circuit Court, seeking to recover judgment against it for the sum of \$1500. The claim is based upon a policy of insurance issued by the defendant to the appellant, Hudson, insuring him for the term of six months against loss or damage by fire of one lot of hemp, which was destroyed by fire, and was of the value of \$10,000. A considerable portion of the stipulations contained in the policy are set out in the petition, showing the undertaking upon the part of defendant, and from which averment it appears that plaintiffs were entitled to a judgment for the \$1500, there being other insurance upon the property. It is further alleged in the petition as follows: "Said contract is filed herewith as part hereof, and made a part hereof as fully as if copied herein."

<sup>1</sup> A part of the opinion is omitted. — Ed.



The defendant demurred to so much of the petition as claimed a right to recover more than \$1250, for the reason that said petition and exhibit do not state facts sufficient to constitute or support a cause of action for more than \$1250. The court sustained the demurrer, and plaintiffs failing to plead further, a judgment was rendered in their favor for the \$1250, and the petition dismissed in so far as it sought to recover more than said sum, and from that judgment this appeal is prosecuted.

It is insisted for appellants that the demurrer ought to have been overruled, for the reason that, so far as the petition contained allegations as to the liability of defendant, it was sufficient; in other words, it is insisted that the petition showed a right to recover as much as \$1500. The real question involved upon the demurrer is whether the entire policy sued on, together with all its stipulations and conditions, must be considered as part and parcel of the petition for the purpose of demurrer. It will be seen that as part of the policy there is a stipulation providing that in no event shall defendant be liable for more than three-fourths of the value of the property when destroyed, and, when there is other insurance, that its liability shall be regulated and controlled in that proportion.

It is the further contention of appellants that under section 120 of the Civil Code of Practice they were required to file the policy because their cause of action was based thereon, but the filing thereof did not cause every stipulation of the policy to become part and parcel of the petition for the purpose of sustaining a demurrer thereto, and therefore the demurrer ought to have been overruled. And it is further contended that, if the three-fourths clause was available as a defense, it could only be made so by answer. It is the contention of appellee that the entire policy constitutes part and parcel of the petition, and must all be considered on demurrer. Appellee cites *Haney v. Tempest*, 3 Mete. 97, and *Wile v. Sweeney*, 2 Duv. 162. Appellants cite *Collins v. Blackburn*, 14 B. Mon. 252, *Hill v. Barrett*, Id. 83, *Yewell v. Bradshaw*, 2 Duv. 575, together with some decisions of other courts of last resort. It will be seen that the plaintiffs, by a specific statement, made the policy in question part of the petition to the same extent as if it had been copied therein. After a careful consideration of the authorities, we are of opinion that the policy in this case constitutes part and parcel of the petition, and was properly considered in considering the demurrer. It may be true that the mere reference to and the filing of a paper which is the foundation of plaintiff's claim will not be considered as part of the petition in order that the same may be

held to be sufficient, it being a well-settled rule of law that the averments of the petition must show a right to recover, and, where the contract relied on is made part of the petition by the unequivocal averments thereof, it constitutes part and parcel thereof; and, if the making of the same a part of the petition results in the pleading being contradictory, the pleader must suffer the consequences, for it is a well-settled rule of law that a pleading is to be construed most strongly against the pleader. . . .

It results from the foregoing that the demurrer was properly sustained. The judgment appealed from is therefore affirmed.<sup>1</sup>

### BARBER v. VINCENT.

COMMON PLEAS. 1680.

[Reported *Freeman*, 531.]

INDEBITATUS *assumpsit* for a horse sold for 20*l*. The defendant pleaded *deins age*.

The plaintiff replied, that he sold him the horse for his conveniency to carry him about his necessary affairs; to which the defendant demurred.

And the sole question was, whether an action would lie against an infant for money for a horse sold? It was urged on the defendant's part, that an infant was chargeable only for necessaries, as meat, drink, clothes, lodging, and education. Cro. Eliz. 175. Cro. Car. Ayliff v. Archbold, Latch, 169.

But the Court were of a contrary opinion; for the plaintiff having averred, that he sold him the horse to ride about upon his necessary occasions, and the defendant having confessed it by his demurrer, it must now be taken to be so: if the defendant had traversed, then the jury must have judged of it, whether it were necessary or convenient, or not? and so likewise of the price of the horse, whether it were excessive, or not?

*Jud' pro quer' nisi.*

<sup>1</sup> If the instrument filed with the pleading is not incorporated by reference, it is generally held that it will not be considered on a demurrer to the pleading. *Bogardus v. Trial*, 1 Scam. (Ill.), 63; *Metzger v. Credit System Co.*, 59 N. J. L. 340, 36 Atl. 661.

When a pleading states that a certain instrument is thereto annexed and made a part thereof, but in fact it was not annexed thereto nor filed therewith, the court will not treat it as part of the pleading, on a demurrer thereto. *Lamore v. Cox*, 32 La. Ann. 1045. — Ed.

SCHLICHT v. THE STATE.  
SUPREME COURT OF INDIANA. 1877.

[Reported 56 *Indiana*, 173.]

Howk, J. Appellant was indicted, at the February term, 1876, of the court below, for an alleged violation of section 12, of "An act to regulate and license the sale of spiritous, vinous and malt and other intoxicating liquors," etc., approved March 17th, 1875. 1 R. S. 1876, p. 869. The indictment charged that the appellant, on the 7th day of August, 1875, at Ripley county, Indiana, unlawfully sold one gill of spiritous liquor, commonly called whiskey, to one Job Caster, at and for the price of ten cents, — he, the appellant, "not then and there having a license so to do."

Appellant moved the court below to quash said indictment, which motion was overruled, and appellant excepted. And, having been arraigned on said indictment, appellant's plea thereto was, that he was not guilty. The cause was tried by a jury, in the court below, and a verdict was returned, finding the appellant guilty as charged in the indictment, and assessing his fine at twenty dollars. And judgment was rendered upon the verdict, by the court below. . . .

In this court, the appellant has assigned the following alleged errors of the court below, to wit:

1st. In overruling appellant's motion to quash the indictment.<sup>1</sup> . . .

Appellant also insists that the indictment was defective, because "there is no averment that the liquor was intoxicating." The liquor sold is described in the indictment as "spiritous liquor, commonly called whiskey." In the case of *Carmon v. The State*, 18 Ind. 450, it was held, that "the court, from its general knowledge, can judicially say that whiskey is an intoxicating liquor; and the jury might so find upon their general knowledge." And the case cited was approved and followed by this court, in the late case of *Eagan v. The State*, 53 Ind. 162. From these authorities, our conclusion is, that it was sufficiently shown in the indictment in this case, that the liquor, charged to have been unlawfully sold by the appellant, was intoxicating.

<sup>1</sup> The opinion of the court as to other alleged errors is omitted. — Ed.

We hold, therefore, that the court below committed no error in overruling appellant's motion to quash the indictment. . . .

We find no error in the record.

The judgment of the court below is affirmed, at appellant's costs.<sup>1</sup>

CLOUGH *v.* GOGGINS.

SUPREME COURT OF IOWA. 1875.

[Reported 40 *Iowa*, 325.]

ACTION upon two promissory notes made by defendant, Oct. 1, 1871, and payable to plaintiff. A demurrer to the petition, on the ground that it shows the notes were executed on Sunday, was overruled. Defendant refusing to farther plead, a judgment was rendered against him, from which he appeals.

BECK, J. I. Contracts made in this State upon Sunday are void, and a promissory note made upon that day will not support an action. *Pike v. King*, 16 *Iowa*, 50; *Sayre v. Wheeler*, 31 *Iowa*, 112.

II. Courts will judicially take notice of the coincidence of days of the week with days of the month, as what days fall upon Sunday. 1 *Greenleaf's Ev.*, § 5; 1 *Phillips' Ev.* (Cowen & Hill's, and Edwards' notes), p. 625.

III. Matters of which judicial notice is taken need not be stated in a pleading. Code, § 2722. This is a common law rule. 1 *Chit. on Pleading*, p. 245.

The court will take judicial notice that the day upon which the notes in suit were executed, October 1, 1871, was Sunday. In order to bring that fact to the consideration of the court, it was not necessary it should be alleged in any pleading subsequent to the petition, for the petition, interpreted by the judicial knowledge of the court, disclosed the fact. The petition then, as it contained matter which defeated plaintiff's claim, was rightly assailed by the demurrer, which should have been sustained. The judgment of the District Court must, therefore, be *Reversed.*<sup>2</sup>

<sup>1</sup> See Thayer, Preliminary Treatise on Evidence, Chap. VII; 4 Wigmore, Evidence, secs. 2565-2582. In most of the cases cited the question arose on the evidence and not on the pleadings. — Ed.

<sup>2</sup> The court may take judicial notice that an allegation of fact in the pleadings is untrue. *Southern Railway Co. v. Covenia*, 100 Ga. 46, 29 S. E. 219. — Ed.



HANCOCK NATIONAL BANK *v.* ELLIS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1896.

[Reported 166 *Massachusetts*, 414.]

ALLEN, J.<sup>1</sup> This case comes up on demurrer to the plaintiff's declaration. It is averred, in substance, that under the statute of Kansas, as interpreted by the decisions of the Supreme Court of that State, the liability of the defendant as a stockholder is a contractual liability, and arises upon the contract of subscription to the capital stock made by the defendant in becoming a stockholder, and that in subscribing to said stock and becoming a stockholder he thereby guaranteed payment to the creditors of an amount equal to the par value of the stock held and owned by him, which should be payable to the judgment creditors of said corporation who first pursued their remedy under the statute; and that an action to enforce said liability is transitory, and may be brought in any court of general jurisdiction in the State where personal service can be made upon the stockholder.

The liability of the stockholders must be determined according to the law of Kansas. *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349, 353. *Halsey v. McLean*, 12 Allen, 438, 441. *Flash v. Conn.*, 109 U. S. 371. We now have a case where the declaration, as we interpret it, sets forth that according to the law of Kansas the defendant is liable to a judgment creditor of the corporation as upon a contract, which is suable anywhere. The facts alleged in this respect are different from those in any case heretofore presented to this court (see *Bank of North America v. Rindge*, 154 Mass. 203), and the alleged liability of stockholders is of a different character from that which exists in this Commonwealth. We are, however, to adopt the construction which is given in Kansas to the liability and undertaking of stockholders in Kansas corporations, and to give force and effect to the same as there established. Accordingly, jurisdiction exists here to enforce the liability like other debts, if the law of Kansas is accurately stated in the declaration. On the demurrer we can only look at the averments of the declaration. We cannot take judicial notice of the statutes of Kansas, or of their interpretation by the courts of that State. At this stage, we simply look at the case as the plaintiff presents it.

<sup>1</sup> The statement of facts is omitted. — ED.

The fact that the corporation is in the hands of receivers is immaterial, because, under the averments of the declaration, the liability of the defendant is directly to creditors, and the receivers could not enforce it. *Barre National Bank v. Hingham Manuf. Co.*, 127 Mass. 563, 567. *Cook, Stock & Stockholders*, § 218, and cases there cited.

The averments are sufficient to set forth that the defendant is such a stockholder as by the law of Kansas would be liable to the plaintiff.

*Judgment reversed. Demurrer overruled.*<sup>1</sup>

# HAITON and Others, Assignees, v. JEFFREYS.

KING'S BENCH. 1715.

[Reported 10 *Modern Reports*, 280.]

THE COURT was moved for leave to plead a plea, and demur to the declaration, at the same time, upon the 4 Anne, c. 16, § 1, the words of which are, "That it shall be lawful for any defendant, or tenant in any action or suit, or for any plaintiff in replevin, in any court of record, with the leave of the same court, to plead as many several matters thereto, as he shall think necessary for his defence: provided nevertheless, that if any such matter shall, upon a demurrer joined, be judged insufficient, costs, &c."

THE COURT. The words of the act of parliament are, "that it shall be lawful to plead as many several matters, &c." Now a demurrer is so far from being a plea, that it is an excuse for not pleading. Here you plead, and at the same time pray that you may not plead. The word "matter" imports a possibility that the other party may demur to it: but there can be no demurrer upon a demurrer. This was never attempted before.<sup>2</sup>

<sup>1</sup> *Miller v. Aldrich*, 202 Mass. 109, 88 N. E. 441; *Sultan of Turkey v. Tiryakian*, 162 N. Y. App. Div. 613, 147 N. Y. Supp. 978, *accord*.

As to how far the federal courts will take judicial notice of the law of the several states, see *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 S. Ct. 242. — Ed.

<sup>2</sup> See 6 Encyc. of Pl. and Pr. 382.

In some jurisdictions the rule has been changed by statute. *Common Law Procedure Act*, 1852, sec. 80; *Hobson v. Satterlee*, 163 Mass. 402, 40 N. E. 189.

A party may of course demur to one or more separate causes of action or defenses and answer as to the residue. — Ed.

## THE AUBURN AND OWASCO CANAL CO. v. LEITCH.

SUPREME COURT OF NEW YORK. 1847.

[Reported 4 *Denio*, 65.]

DEMURRER to a replication. The declaration was in *assumpsit* for the recovery of certain instalments due upon shares of the capital stock of the plaintiff's corporation, subscribed for by the defendant. Pleas, 1. *Non-assumpsit*. 2. *Nul tiel corporation*. Replication to the second plea, setting out the act incorporating the plaintiff, together with certain acts amending and continuing that act. The defendant demurred to the replication, and the plaintiff joined in demurrer.

*By the Court*, BRONSON, C. J.<sup>1</sup> The defendant insists that the declaration is bad on general demurrer. [The chief justice then examined the pleadings, and came to the conclusion that the declaration was substantially defective; and then proceeded as follows:] But it is said, that as the defendant pleaded *non assumpsit* as well as *nul tiel corporation*, he cannot upon this demurrer go back, and attack the declaration; and several cases have been cited to sustain that position. But it will be found on examination that the point has never been directly and necessarily adjudged. . . .

It is quite clear that the defendant cannot both plead and demur to the same count. And it is equally clear, that at the common law, he could not have two pleas to the same count. Indeed the two things, though stated in different words, are only parts of one common law rule; to wit, that the defendant cannot make two answers to the same pleading. The statute of 4 and 5 Anne, c. 16, was made to remedy this inconvenience; and it allowed the defendant, with the leave of the court, to plead as many several matters as he should think necessary for his defence. With us, leave of the court is no longer necessary. 2 R. S. 352, § 9. The statute does not say that the defendant may both plead and demur; and consequently he cannot make two such answers. But he may plead two or more pleas; some of which may terminate in issues of fact, to be tried by a jury; while others may result in issues of law, to be determined by the court. And whenever we come to a demurrer, whether it be to the plea, replication, rejoinder, or still further onward, the rule is to give judgment against the party who committed the first fault in pleading, if the fault be such as would make the pleading bad on general demurrer. This rule has always

<sup>1</sup> A part of the opinion is omitted. — Ed.

prevailed. It was the rule prior to the statute of Anne; and to say that the defendant, because he pleads two pleas, one of which results in a demurrer, cannot go back and attack the declaration, would be to deprive him of a portion of the privilege which the legislature intended to confer. He cannot plead and demur at the same time, because the common law forbids it; and the statute does not allow it. But he may plead two pleas; and he takes the right with all its legitimate consequences; one of which is, that whenever there comes a demurrer upon either of the two lines of pleading, he may run back upon that line to see which party committed the first fault; and against that party judgment will be rendered. Aside from the *dicta* in question, there is not a shadow of authority, either here or in England, for a different doctrine. . . .

*Judgment for the defendant.*<sup>1</sup>

JOHNSON v. THE PENSACOLA AND PERDIDO  
RAILROAD COMPANY.

SUPREME COURT OF FLORIDA. 1878.

[Reported 16 *Florida*, 623.]

WESTCOTT, J.<sup>2</sup> This writ of error is prosecuted here by James B. Johnson, the plaintiff in the Circuit Court. What he questions first, as a matter of practice, is the correctness of the ruling of the Circuit Court upon the demurrer to defendant's pleas. The defendant before filing its pleas had demurred to the declaration, and the court had overruled the demurrer. To the pleas then filed the plaintiff demurred, and the first question in the case to be determined is, does this demurrer reach the declaration, or, the declaration having been sustained by the court in overruling defendant's demurrer thereto, does this action of the court fix the law of the case, and, upon demurrer to the plea, prevent this court or the Circuit Court from going back to the declaration?

The plaintiff in error here maintains that it does, and insists that the only question is, admitting the declaration to be good, is

<sup>1</sup> *Henderson v. Hale*, 19 Ala. 154; *Gould v. Steyer*, 75 Ind. 50; *Dorsey v. State*, 4 Gill & J. (Md.), 471, *accord*.

Supreme Lodge K. of P. v. *McLennan*, 171 Ill. 417, 49 N. E. 430; *Baldwin v. City of Aberdeen*, 23 S. Dak. 636, 123 N. W. 80, 26 L. R. A. (N.S.), 116, *contra*. — Ed.

<sup>2</sup> The statement of facts and a part of the opinion in which the declaration is examined and held insufficient are omitted. — Ed.



this a good plea? The only case brought to our attention in this connection is the case of Ellison, Adm'r, *v.* Allen, 8 Fla., 209. There this court held that a defendant in the Circuit Court, and appellant here, could not avail himself of his demurrer, abandoned in that court, by his pleading over when it was overruled.

We will state the principles of law controlling this subject as applicable to that case, as well as to this. Upon the interposition of the demurrer of the defendant to plaintiff's declaration, going as it did to the sufficiency in law of the matter stated as a foundation for the action, the judgment consequent upon the overruling the demurrer was a judgment *quod recuperet*. This was the strict common law rule. Tidd's Prac., 657. This rule has been varied in most of the State courts, as well as in the courts of the United States. The general rule is now that even after the court has announced its judgment to be that the declaration is good in law, the defendant is permitted to withdraw his demurrer, to plead *de novo*, and thus avoid a final judgment against him. In this State the statute provides (act of Nov. 23, 1828, Thomp. Dig., 331), that "no demurrer, either at law or in equity, shall be considered as an admission of the facts set forth in the pleadings demurred to, so as to debar the person demurring from any substantial claim or defence which he might have urged if said demurrer had not been filed," and the constant practice upon the circuit is, upon overruling a demurrer to a declaration, to permit the defendant to plead to the merits. When, however, he pleads to the merits he must withdraw his demurrer, and the consequent final judgment *quod recuperet*, which is the only known form of judgment which can follow overruling a general demurrer to a declaration, is not entered. This is the reason why a defendant, if he pleads over after judgment against him upon his demurrer to the declaration, is held to waive his demurrer. In such cases courts of error, controlled by the common law practice, treat the record as not containing any such judgment or demurrer — treat the case as if no demurrer had been filed. This, in view of our statute, is eminently just and proper. The statute takes from the plaintiff, so far as defendant's pleading is concerned, all advantage of the judgment in his favor upon defendant's demurrer to his declaration; and as to the defendant, it very properly provides that his case shall stand as "if said demurrer had not been filed." This is the reason why the appellant in the case referred to by the plaintiff in error here (8 Fla., 209), was not permitted to assign for error the judgment of the court upon his demurrer. This court in that case says, if he desired to

have that ruling reversed he should have refused to go to the country, and have permitted the judgment on the demurrer to stand. The only authority cited by this court in that case for the view there announced was the case of the United States *v.* Boyd, 5 How., 51. There the Supreme Court of the United States says, "The withdrawal of the demurrer and going to issue upon the pleading operated as a waiver of the judgment. If the defendants had intended to have a review of that judgment on a writ of error, they should have refused to amend the pleadings and have permitted the judgment on the demurrer to stand." The Supreme Court of the United States is somewhat more explicit in the language used in the later cases covering this subject. In the United States *v.* Vigil, 10 Wall., 423, that court says, "The filing of a plea to the merits after the demurrer was overruled, operated as a waiver of the demurrer. The pleading was thus abandoned and ceased thenceforth to be a part of the record." In Young *v.* Martin, 8 Wall., 357, the same court, in speaking of this subject says, "They thus abandoned their demurrer, and it ceased to be a part of the record."

With this explanation and statement of the true grounds of this action of the court and of the Supreme Court of the United States, in cases where the plaintiff in error seeks to question a judgment of the court of original jurisdiction overruling a demurrer after he has plead over, we ask what is the result of its application here? The rule being that such a demurrer and judgment is, in contemplation of law, no part of the record, or if it is strictly a part of the record it is waived, then the general rule that upon plaintiff's demurrer to the defendant's pleas, the sufficiency of the declaration is brought in question must operate, for the simple reason that there is nothing to prevent its operation. The record stands as if originally there was nothing but the declaration, the plea and the demurrer thereto. Why should the defendant be held to have waived his demurrer, and the plaintiff be given all advantage of it in the same manner as if not waived? How can it be held that a demurrer can be considered as withdrawn for one party and not for the other? The law has no such anomalies. If it is withdrawn it is withdrawn for all parties, and that is the end of it.

This, our conclusion, reasoning from elementary principles of pleading, is sustained, without exception, by the cases which we have been able to find covering the precise point. In Cummings *v.* Gray, 4 Stew. & Port., 397, the Supreme Court of Alabama says, "That where a demurrer to a declaration containing no substantial

cause of action has been overruled and the defendant pleads over, a second demurrer may well be extended back to the declaration." To the same effect are the cases reported in 13 Ala., 265, and 13 Ala., 490-500, and the like rule is announced by the Supreme Court of the United States in 7 Wall., 93. Our conclusion as to this point is that the demurrer to the plea reached the declaration, notwithstanding a previous demurrer to the declaration overruled, and that upon the argument of the demurrer to the plea, the record was to be treated in just the same manner as it should have been if no demurrer to the declaration was ever filed. . . .

Our conclusion is that the declaration does not contain a legal cause of action, and that the demurrer to the pleas of the defendant reached the declaration, notwithstanding a previous demurrer to the declaration by the defendant had been overruled. The judgment must be affirmed.<sup>1</sup>

### BROOKE *v.* BROOKE and Others.

KING'S BENCH. 1664.

[Reported 1 *Siderfin*, 184.]<sup>2</sup>

IN trespass for taking a hook, etc., the defendant pleaded that he had a way to such a wood across the land of the plaintiff, that he was passing there, and that the plaintiff endeavored to cut his harness and to wound him with the said hook, wherefore he took the said hook out of the hands of the plaintiff, and delivered it to the constable, etc. Issue upon the way, and verdict for the plaintiff. And it was moved, in arrest of judgment, that the plaintiff had not shown in his declaration that the hook was in his possession. And it was agreed by the court, that if the defendant had pleaded Not guilty, the judgment should be arrested, because the plaintiff does not say in his declaration *hancum suum*, nor show that it was in his possession. But in this case the court were of opinion that the defendant, by his special plea, made the declaration good, for the defendant pleads that he took the hook *extra possessionem* of the plaintiff, wherefore the plaintiff may well maintain this action on his possession without any property.

<sup>1</sup> *City of Chicago v. The People*, 210 Ill. 84, 74 N. E. 816, *contra*. — Ed.

<sup>2</sup> See Ames, *Cases on Pleading*, ed. of 1905, 63. — Ed.

## LYCOMING FIRE INSURANCE COMPANY v. MEDAD WRIGHT &amp; SON.

SUPREME COURT OF VERMONT. 1883.

[Reported 55 *Vermont*, 526.]

GENERAL and special assumpsit to recover assessments on premium notes. Pleas, general issue and four special pleas in bar. Heard on demurrer to the special pleas, March Term, 1883, REDFIELD, J., presiding. Demurrer overruled.

ROYCE, Ch. J.<sup>1</sup> . . . The declaration is fatally defective in not alleging that the plaintiff company had obtained a license which was in force, to transact insurance business at the time the contract was entered into, unless the defect is cured by the last plea. The language which it is claimed has that effect is that, "before obtaining or receiving a license from the insurance commissioners authorizing said plaintiff to transact insurance business in this State and before entering into the contract declared upon," etc. This, it is claimed, is to be construed as an admission that such a license had been obtained. Treating it as such an admission, it does not cure the defect complained of. It was not enough to allege that the plaintiff company had obtained a license; it should have been alleged that it had a license which was *in force* at the time the contract was entered into. In *Ralston v. Strong*, 1 D. Chip. 287, it is said by Judge CHIPMAN that a plea may, by a direct admission of facts omitted or obscurely expressed, aid the declaration. That we think expresses the true rule; and applying it to the language here used, there was no such admission made that a license had been obtained at any time, so that the defect in the declaration was not cured by the plea. . . .

The pleas demurred to are sufficient, but the judgment overruling the demurrers is reversed *pro forma*, and causes remanded in order that the plaintiffs may apply for leave to amend their declarations.<sup>2</sup>

<sup>1</sup> A part of the opinion is omitted. — Ed.

<sup>2</sup> See 1 Chitty, Pleading, 16th Am. ed., \* 703; 6 Encyc. of Pl. & Pr. 372. The declaration may be aided by allegations in a plea filed after the statute of limitations has run on the plaintiff's cause of action. *Vickery v. New London Northern R. R. Co.*, 87 Conn. 634, 89 Atl. 277.

A plea may be aided by an admission in the replication. *United States v. Morris*, 10 Wheat. (U. S.), 246.

As to aider of a declaration by allegations in the replication, see *Marine*



## MARSH, Executor of QUINLAIN, v. BULTEEL.

KING'S BENCH. 1882.

[Reported 5 *Barnewall & Alderson*, 507.]

COVENANT upon a deed, whereby the parties agreed to submit certain differences to the award of arbitrators. The first count of the declaration stated the defendant's covenant to obey, abide by, and perform the award, and that he would not by affected delay, or otherwise hinder, or prevent the arbitrators from making their award. It then stated, that the arbitrators duly made their award, and that they thereby directed, that the defendant should pay to the plaintiff certain sums therein mentioned. The breaches assigned were, that the defendant did not pay those sums of money. The second count was founded upon the same deed, and assigned as a breach, that the defendant did, before the making of the award, hinder and prevent the arbitrators from making their award in this, that the defendant, by a certain deed in writing, signed and sealed with the seal of the defendant, after reciting as therein was recited, did revoke, abrogate, and put to an end to, and determine all and every arbitration or arbitrations, reference or references to arbitration, deed or deeds of submission, agreement or agreements, contract or contracts to refer to the arbitration or award of the said arbitrators, whereby they, the said arbitrators, were hindered and

Trust Co. v. St. James A. M. E. Church, 85 N. J. L. 272, 88 Atl. 1075. But see *Kearney County Bank v. Zimmerman*, 5 Neb. (Unof.), 556.

In *Cummins v. Gray*, 4 Stew. & P. (Ala.), 397, a demurrer to a defective declaration was overruled and the defendant pleaded over. The plaintiff demurred to the plea. The court held that the demurrer reached back to the declaration, which was held to be bad in substance, and judgment was given for the defendant. The Supreme Court affirmed the judgment saying: "Many defects in a declaration may be cured, by pleading to the merits, either before or after a demurrer. So far as this effect has been produced, the plaintiff is entitled to the benefit of it, whenever the question subsequently recurs, whether on a second demurrer, on a motion in arrest of judgment, or in error. Where, however, the declaration does not contain a substantial cause of action, the insufficiencies cannot be cured by a plea to the merits."

PLEADING VITIATED BY SUBSEQUENT PLEADING. In *Keay v. Goodwin*, 16 Mass. 1, 3, the court said "Although on demurrer the court will look for the first fault, if it be matter of substance; yet it is also the duty of the court to look at the whole record. If to a defective plea the plaintiff replies, and shews that he had no cause of action, he is not entitled to judgment; although the declaration be good, and the defendant was guilty of the first fault in pleading." — Ed.

prevented from making their said award, and whereby the said plaintiff lost, and was deprived of the benefit that he would otherwise have derived from an award. The defendant pleaded to the first count, that before the arbitrators made their award, he, the defendant, by deed, revoked their authority, of which deed and revocation of their authority, the arbitrators before the making of the award in the first count mentioned, had notice. To this plea the plaintiff demurred. The defendant demurred to the second count of the declaration, and assigned for cause, that it was not alleged, that the arbitrators had notice of the revocation, nor was it shewn how the defendant hindered them from making their award.

ABBOTT, C. J.<sup>1</sup> I am of opinion, that the defendant is entitled to judgment upon the demurrer to the plea to the first count of the declaration. The ground of complaint in that count is the non-payment of money pursuant to the award, or in other words, a breach of the covenant to perform the award when made. It appears by the plea, that the defendant, by countermanding the authority of the arbitrators, has broken the covenant to abide by the award, or that whereby he stipulated not to hinder the arbitrators from making an award; and it is urged on the part of the plaintiff, that although this plea is an answer to the cause of action suggested in this count, yet that, inasmuch as it appears upon the whole record that the defendant has been guilty of a breach of covenant, the plaintiff is entitled to judgment upon that count, and the case of *Charnley v. Winstanley* (5 East, 266) has been relied upon. That case, however, is very distinguishable from the present. There it appeared upon the face of the plaintiff's count, that the award was made after one of the parties to the submission had become a feme covert. Her marriage was in itself a revocation of the authority of the arbitrators, and therefore was a breach of the covenant to abide by the award. In this case, the breach of that covenant is disclosed only by the defendant's plea, and it never has been held, that a plaintiff who seeks to recover damages for one ground of action stated in his count, is entitled to recover in respect of another disclosed by the defendant's plea. I am of opinion, that a plaintiff can recover only in respect of the ground of action stated in his declaration. As to the demurrer to the last count, I cannot distinguish this from *Vynior's* case. There the allegation was, that the party by his deed revoked the authority of

<sup>1</sup> Concurring opinions of Bayley and Holroyd, JJ., are omitted. Best, J., was absent. — ED.

the arbitrator, and the decision was, that that allegation imported notice to have been given to the arbitrator, and that being so, the case is expressly in point with the present. If the declaration in this case had alleged, that the party had sealed and delivered a certain deed, containing therein as follows, and setting out the deed, and thereby revoked the authority of the arbitrators, it would not have been sufficient, for that would only have been an allegation of the effect of the deed. Here the allegation is, that there was an express revocation by deed. . . .

Judgment for the defendant upon the demurrer to the plea to the first count, and judgment for the plaintiff upon the demurrer to the last count.<sup>1</sup>

AYRES v. COVILL.

SUPREME COURT OF NEW YORK. 1854.

[Reported 18 *Barbour*, 260.]

THIS was an action for slander. The complaint alleged that the defendant charged the plaintiff with stealing a written examination of a witness taken before one Torry, a justice of Saratoga county, and filed with him. The complaint did not state that the examination was taken in any judicial proceeding. A statute made it criminal to steal a record of a court of justice, filed with an officer of such court. The defendant filed an answer containing six subdivisions. The third subdivision of the answer stated that the examination was taken in a certain civil proceeding before Torry, and denied that it had been filed with him. The sixth subdivision stated that the plaintiff's general moral character was bad. The plaintiff demurred to the sixth subdivision of the answer on the ground that it did not state facts sufficient to constitute a defense.

The court at a special term, sustained the demurrer, holding that the portion of the answer demurred to was insufficient; that the plaintiff might go back to the complaint and object that it did not state facts sufficient to constitute a cause of action; and that this complaint was defective in that it did not appear that the paper alleged to have been abstracted was taken in any judicial proceeding. But the court further held that the defendant had cured that defect; as, in the third subdivision of his answer, he had supplied all necessary averments. The defendant appealed.

<sup>1</sup> Compare the law as to departures, considered *infra*. — Ed.

By the Court, HAND, P. J.<sup>1</sup> . . . But it is contended that the averments in the third part or division of the answer supply these deficiencies of the complaint. And the judge at special term so decided; feeling bound by the remarks of Mr. Justice Spencer, in delivering the opinion of the court in *Vaughan v. Havens* (8 John. 110), and by the case of *Drake v. Corderoy* (Cro. Car. 288), there cited. But in *Vaughan v. Havens* the question did not in fact arise; for there was no plea but the general issue, and the court held the defendant might use the notice of justification accompanying it or not, as he should be advised. In *Drake v. Corderoy*, the defendant justified, and in so doing supplied the omission of a material averment in the declaration; and the court correctly held that cured the defect. But here, the demurrer is to one plea or answer, and the admission or averment is found in another. Such an admission will not avail the plaintiff on this demurrer. *Robins v. Lord Maidstone*, 4 Q. B. Rep. 811. *Harrington v. McMorris*, 5 Taunt. 228. *Smith v. Martin*, 9 M. & W. 304. *Edmund v. Groves*, 2 Id. 642. *Firmin v. Crucifix*, 5 C. & P. 97. *Montgomery v. Richardson*, Id. 247. *Troy and Rutland R. Co. v. Kerr*, 17 Barb. 581. The admission made in the course of a pleading is not an admission for all the purposes of the cause; but, as Lord Denman stated in *Robins v. Maidstone*, correcting what he had said in *Bingham v. Stanley* (2 Q. B. Rep. 127), is an admission "for all purposes regarding the issue arising from that pleading." The plaintiff has taken issue upon this third answer (see Code, § 168), and he may give evidence also of matter in avoidance thereof. (Id.) And any admission therein may be considered an admission in that line of defense or pleading. But that plea or answer is not before the court on this demurrer. . . .

The judgment must be reversed; but, under the circumstances, both parties should have leave to amend, with costs to abide the event of the suit.

*Ordered accordingly.*<sup>2</sup>

<sup>1</sup> The statement of facts is abridged, and a part of the opinion in which the sixth sub-division of the answer and the complaint are held insufficient, is omitted. — ED.

<sup>2</sup> One count cannot on demurrer thereto be aided by allegations in a separate count not incorporated by reference in the count demurred to. *Birdsall v. Birdsall*, 52 Wis. 208.

A plea cannot on demurrer thereto be aided by allegations in a separate plea not incorporated by reference in the plea demurred to. *Hammond v. Earle*, 58 How. Pr. (N. Y.), 426, 437.

In *Davies v. Penton*, 6 Barn. & Cres. 216, the plaintiff brought an action for breach of contract. The defendant interposed two bad pleas of set-off. To



## STATUTE 27 ELIZABETH, CHAPTER V, SECTION I (1585).

[6 *Statutes at Large*, 360.]

FORASMUCH as excessive charges and expences, and great delay and hindrance of justice, hath grown in actions and suits between the subjects of this realm, by reason that upon some small mistaking or want of form in pleading, judgments are often reversed by writs of error, and oftentimes upon demurrers in law given otherwise than the matter in law and very right of the cause doth require, whereby the parties are constrained either utterly to lose their right, or else, after long time and great trouble and expences, to renew again their suits: for remedy whereof, be it enacted by the Queen's most excellent majesty, the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, That from henceforth, after demurrer joined and entred in any action or suit in any court of record within this realm, the judges shall proceed and give judgment according as the very right and cause of the matter in law shall appear unto them, without regarding any imperfection, defect, or want of form in any writ, return, plaint, declaration, or other pleading, process, or course of proceeding whatsoever, except those only which the party demurring shall specially and particularly set down and express together with his demurrer; and that no judgment to be given shall be reversed by any writ of error, for any such imperfection, defect, or want of form as is aforesaid, except such only as is before excepted.<sup>1</sup>

the first plea the plaintiff demurred. To the second he interposed a replication, alleging his discharge in bankruptcy. The demurrer was sustained, the court refusing to consider, on the demurrer to the first plea, the facts alleged in the replication to the second plea. — Ed.

<sup>1</sup> This statute was supplemented by the statute 4 Anne, c. 16, sec. 1, which provided that "from and after the said first day of Trinity term, no advantage or exception shall be taken of or for an immaterial traverse; or of or for the default of entering pledges upon any bill or declaration; or of or for the default of alleging the bringing into court any bond, bill, indenture, or other deed whatsoever mentioned in the declaration or other pleading; or of or for the default of alleging of the bringing into court letters testamentary, or letters of administration; or of or for the omission of *Vi et Armis et contra pacem*, or either of them; or of or for the want of averment of *Hoc paratus est verificare*, or *Hoc paratus est verificare per Recordum*; or of or for not alleging *prout patet per Recordum*, but the court shall give judgment according to the very right of the cause, as aforesaid, without regarding any such imperfections, omissions, and defects, or any other matter of like nature, except the same shall be specially and particularly set down and shown for cause of demurrer." — Ed.

[Form of Special Demurrer.]

In the.....Court of the County of....., State of......

|       |   |                                                         |
|-------|---|---------------------------------------------------------|
| C. D. | } | And the defendant by X. Y., his attorney, says that the |
| ats.  |   |                                                         |
| A. B. |   |                                                         |

said declaration is not sufficient in law. And the defendant states and shows to the court here the following causes of demurrer to the said declaration, that is to say, that [*Here state the particular causes*]. And also that the said declaration is in other respects uncertain, informal, and insufficient, etc.

X. Y., Attorney for Defendant.

MATHEWS *v.* CONVERSE *et al.*

SUPREME COURT OF ERRORS OF CONNECTICUT. 1910.

[Reported 83 *Connecticut*, 511.]

SUIT to foreclose a judgment lien and to have certain conveyances set aside as fraudulent and void against the plaintiff, brought to the Superior Court in Tolland County where a demurrer to the complaint was overruled (Ralph Wheeler, J.) and the cause was afterward tried to the court, Case, J.; facts found and judgment rendered for the plaintiff, from which the defendants appealed.

*No error.*

THAYER, J.<sup>1</sup> The complaint states that the plaintiff obtained a judgment against three of the defendants, Mira L. Converse, Lillia A. Lee, and Louis S. Converse, at the September term, 1905 of the Superior Court in Tolland county, that the judgment was partially satisfied only, and that a lien for the balance due upon the judgment was placed upon the property now sought to be foreclosed. It is alleged that this property was attached on May 23d, 1905, upon the original writ in the action, as the property of the defendants above named, and that they are, as to the plaintiff, the actual owners of the property, but that in September and October, 1903, and in January, 1904, the different parcels of land comprising the property attached had been conveyed by them to others of the defendants with the fraudulent intent, which was known to the grantees, to avoid the claims upon which the judgment was based. . . .

Only one question deserving mention was raised by the demurrer, namely, whether the complaint shows that at the time the alleged fraudulent conveyances were made the grantors therein owed any

<sup>1</sup> A part of the opinion is omitted. — Ed.

debt or duty to the plaintiff. It appears that the action which was brought to enforce the payment of the obligation was brought subsequent to the making of the conveyances. It does not follow from this fact that the obligation did not exist at the time the conveyances were made. It is alleged in the complaint that the fraudulent purpose in making them was to avoid the claim upon which the judgment in that suit was based. This is an argumentative rather than a direct allegation of the existence of the claim at the time of the conveyances. But the demurrer was to the substance, not to the form, of the complaint. The allegations were sufficient to admit proof that there was an existing debt, at the time of the conveyance, due from the grantors to the plaintiff. The complaint was sufficient in substance, and the demurrer was properly overruled.

There is no error.

In this opinion the other judges concurred.<sup>1</sup>

# RYLEY v. PARKHURST and two others.

KING'S BENCH. 1748.

[Reported 1 *Wilson*, 219.]

TRESPASS for taking and impounding the cattle of the plaintiff at Teddington in the county of Middlesex. All the defendants plead the general issue and thereupon issue is joined. Two of the defendants plead another plea (without saying by leave of the court), that one of them is seised of a certain close at Kingston in Surry, and the other as his servant, and justify the taking the cattle there *damage feasant*, and that they drove them to, and impounded them at Teddington, as it was lawful for them to do. The plaintiff demurs, and therein says that the plea is uncertain, informal, and double, but does not say what the duplicity is.

*Lawson* for the plaintiff — 1st, This is a double plea, for the general issue is an answer to the whole declaration, and the other plea is not said to be with leave of the court.<sup>2</sup> . . .

Serjeant *Bootle*, *contra* — As to the 1st objection, Bartholomew v. Ireland, Mich. 11 Geo. 2, B. R. Trespass for breaking and entering plaintiff's chambers in Staples-Inn, the defendant

<sup>1</sup> See *Sheridan v. Sheridan*, 58 Vt. 504, 5 Atl. 494; *Walker v. Wooster's Admr.*, 61 Vt. 403, 17 Atl. 792; 6 *Encyc. of Pl. and Pr.* 272. — Ed.

<sup>2</sup> Only so much of the opinion as relates to the point of duplicity is here given. — Ed.

pleaded several pleas without saying by leave of the court, which was shewn for special cause of demurrer; but the court only said it was an irregularity, and held it good on a demurrer; Sir *John Strange* was for the plaintiff, and *myself* for the defendant, who had judgment, and the duplicity must be pointed out by the demurrer, which is not done here. Salk. 219. Comyns 115. . . .

Of this opinion was the court in both points, and judgment for the defendant *per totam curiam*.<sup>1</sup>

THE CENTRAL RAILROAD COMPANY OF NEW  
JERSEY *ads.* VAN HORN and her husband.

SUPREME COURT OF NEW JERSEY. 1875.

[Reported 38 *New Jersey Law*, 133.]

BEASLEY, C. J.<sup>2</sup> . . . The second count, on the point of negligence, differs from the first, by omitting, altogether, all account of the mode of such negligence. It shows, merely, that the plaintiff was in the cars, under a duty of the defendant to carry her safely, and then avers, that she was, "through the negligence, carelessness and misdirection of the defendant and its agents and servants, thrown from and under the coaches or railcars of the said defendant, by means whereof," &c.

It is obvious that such a charge as this goes but a little way towards informing the defendant of the case to be set up against it. I find no precedent in which such extreme generality of statement, with respect to the fact of the carelessness forming the action, has been sanctioned. It is true, that in a suit in case for negligence it is quite common to aver that the injury was inflicted by the want of care in the defendant, omitting all specification of the mode of the fault. But it will be found, upon scrutiny, that in such cases the act, concerning the doing of which negligence is predicated, is of a simple character, so that an allegation of an absence of care in its performance, becomes reasonably intelligible. Thus, when it is stated that a defendant's boat, by his "carelessness, mis-

<sup>1</sup> See *Ferguson v. National Shoemakers*, 108 Me. 189, 79 Atl. 469.

Even before the statute of 27 Elizabeth duplicity could be taken advantage of only on special demurrer.

But the defect of misjoinder of causes of action may at common law be taken advantage of on general demurrer. *Wilkins v. Standard Oil Co.*, 71 N. J. L. 399, 59 Atl. 14; Gould, *Pleading*, 2d ed., 437. — ED.

<sup>2</sup> The statement of facts and a part of the opinion upholding another count in the declaration are omitted. — ED.



management, and want of care," as in the form in 2 Chitty's Pl. 711, ran foul of and struck the vessel of the plaintiff, an amount of information sufficient to enable the defendant to understand the case to be made against him, is evidently communicated. Similarly this is done in other instances, that may be found in the books of precedents. The case cited in the brief of the counsel of the defendant is one of this class, it being an action by a railroad company for causing the death of a person by running over him with a locomotive, and it being held that a general averment that the defendant, by its agents, did carelessly and negligently run over, &c., was sufficient, without stating the particulars of such negligence. *Indianapolis P. & E. R. R. Co. v. Kelley's Adm'rs*, 23 Ind. 133. So the same absence of particularity is allowable where the knowledge of the circumstances must, in the nature of things, be confined to the party inculpated; as where goods are lost by the carelessness of a bailee, in which case it seldom happens that the owner knows the fault which occasioned the loss. But the present case differs from these in its obvious complexity, and in the circumstances that the plaintiff must be possessed of some further knowledge of the manner of the casualty. The statement is, that she was in the cars, and was thrown out by the negligence of the agents of the defendant. The field covered by such a general allegation is, in reality, immense, for it embraces everything involved in the construction of the road and its equipments, or in anywise connected with its methods of running. A railroad company must, of necessity, transact its business by means of innumerable agents, and hence, to allege, that by some act done or omitted, by some one of such agents, an accident has occurred, is to convey very little practical intelligence. A general charge of carelessness, when used in such a connection, has a very different effect from what it has when applied to the single act of sailing a boat or driving a wagon. There is no very exact criterion on that subject, the only general rule that can be propounded, being to the effect, that the certainty in the statement of the plaintiff's case must be such that it is intelligible, and that in a reasonable measure it apprises the defendant of the substantial case to be made against him. In my judgment, this has not been done in this second count, and therefore I should have struck it out on a motion for that purpose. But it is clearly good on a general demurrer, the defect being one of form, and not of substance.

The plaintiff must have judgment, with the usual leave for the defendant to plead anew.

## MACURDA v. LEWISTON JOURNAL COMPANY.

SUPREME JUDICIAL COURT OF MAINE. 1908.

[Reported 104 *Maine*, 554.]

KING, J. Each action is to recover damages for an alleged libel and is before the Law Court on a general demurrer to the declaration. In the first action the publication of the alleged libelous matter is stated in this form:

"Said defendant did . . . falsely and maliciously compose, print, publish and circulate, *or* cause to be composed, printed, published and circulated in a certain public newspaper . . . a certain scandalous and malicious libel of and concerning the plaintiff."

In the other action the publication is stated in this form:

"Said defendant did . . . falsely and maliciously compose and publish *or* cause and prepare to be composed and published . . . in a certain newspaper . . . a certain scandalous and malicious libel of and concerning the plaintiff."

It is a general rule of pleading, too well settled to need the citation of authorities, that the declaration must allege the gravamen — the grievance complained of with such precision, certainty and definiteness that the defendant may know what to answer by his pleading and proof.

A disjunctive allegation as to the essence of the cause of action is as pure an example of uncertainty and indefiniteness in pleading as can well be found, for it completely conceals from the defendant the ground upon which a recovery is claimed.

Such form of allegation has been uniformly regarded as fatally defective.

"A pleading is bad under any system of practice when it states material facts in the alternative, so that it is impossible to determine upon which of several equally substantive averments the pleader relies for the maintenance of his action or defense." 6 Ency. Pl. & Pr., page 268; Chitty on Pl., 16th Am. Ed., star page 260; Stephen on Pl. 240; *State v. Singer*, 101 *Maine*, 299.

In the last case cited this court recently decided that such form of charging, in the disjunctive, in an indictment for libel, violates the rule of certainty in criminal pleading and is fatal on general demurrer. It is there said:

"To be charged with printing and publishing a libel is one thing and to defend against it, evidence of one kind may be required,

while to meet the charge of having caused a libel to be printed and published may require evidence of another and entirely different character. This distinction goes to the essence of the charge."

Applying the same rule of certainty to the declarations in the cases before us, with like discriminating reasoning, and they are found defective because of the disjunctive form in which the publication is alleged.

But it is suggested by plaintiff that such defect is not reached by a general demurrer. We think it is. It is not a defect in form, but in substance. The question to be answered by the declaration is: What act of defendant is relied upon? The answer is uncertain; either that he *did* an act complained of, or *caused* it to be done. This uncertainty of allegation goes to the very essence of the cause of action — to the act of defendant from which the cause of action springs.

If from the declaration the cause of action does not sufficiently appear the pleading is defective in matter of substance.

Here the plaintiff has alleged in each declaration that the defendant did either one or the other of two substantive acts, but he has not disclosed upon which of those acts he relies as the cause of action.

It is the opinion of the court that the declaration in each case is defective because of the disjunctive form of allegation used, and that the defect is reached by general demurrer.

This conclusion makes it unnecessary to consider the other particulars in which it is claimed the declarations are defective. The entry in each case must be, *Exceptions sustained.*<sup>1</sup>

### BURNET v. BISCO.

SUPREME COURT OF NEW YORK. 1809.

[Reported 4 *Johnson*, 235.]

THIS was an action of *assumpsit*. The declaration stated, that on the 26th February, 1808, the defendant made an agreement in

<sup>1</sup> A declaration alleging two facts in the alternative, only one of which is sufficient to constitute a cause of action, is demurrable. *Hoffman v. City of Maysville*, 123 Ky. 707, 97 S. W. 360; *Anderson v. Minneapolis, etc., Ry. Co.*, 103 Minn. 224, 114 N. W. 1123. Compare *Casey Pure Milk Co. v. Booth Fisheries Co.*, 124 Minn. 117, 144 N. W. 450, 51 L. R. A. (N. S.), 640. See 31 Cyc. 74.

As to the distinction in general between defects of form and defects of substance, see Gould, Pleading, 2d ed., p. 467. — Ed.

writing with the plaintiff, whereby she agreed to give the plaintiff the refusal of the farm on which she lived, with the south half of the house, for the term of two years, from the 1st of April, 1808, together with the stock, &c., at the following rate, viz., for the first year, 600 dollars, 140 of which to be paid in November, 160 dollars in December, and the remainder on the 1st May following. For the second year, 900 dollars was to be paid at the like periods, the stock to be appraised by certain persons, on the 1st April, 1808, and again at the end of the two years, and the same amount of stock to be returned, and good security given for the performance of the contract; the farm to be left in as good repair at the end of the two years, as at the commencement, &c., &c., reserving to the defendant land sufficient for her son to keep three horses, and for him to improve in his own person, and for pasturing a cow. The plaintiff averred, that on the 1st April, 1808, he performed the agreement, as far as his part was to be performed, and was then at the place ready to have the stock appraised, &c., and also tendered good security for the performance on his part, &c., yet the defendant not regarding, &c., assigning breaches of the whole agreement on the part of the defendant.

To this declaration the defendant demurred specially, and assigned the following causes:

1. Because the plaintiff, though he states that the defendant did not give the plaintiff the refusal of the farm, &c., does not state that the defendant disposed of the farm to any other person, or that she retained it herself.

2. That the declaration does not state where the farm was situated, nor its value, nor the number of acres, nor the quantity of land to be reserved for the defendant's son, nor how much was requisite for the defendant's son; so that by reason of this uncertainty there was no rule by which to measure the damages.

3. The declaration does not state who were to be the appraisers.

4. The plaintiff does not state what kind of security he offered, nor whether it was written or parol.

To this demurrer there was a joinder, and the same was submitted to the court without argument.

*Per Curiam.* A defect in substance in this declaration is, that there is no consideration stated. The defendant agreed to give the refusal of the farm to the plaintiff; but he did not agree to take it, and there was no promise on his part as a consideration for the promise of the defendant, nor any money paid or other valuable consideration given. The agreement was a mere *nudum pactum*.



A consideration is as necessary to an agreement reduced to writing, as if it remained in parol. (1 Saund. 211, note 2.) There must be judgment for the defendant.<sup>1</sup>

#### NEW YORK CODE OF CIVIL PROCEDURE.

SEC. 488. The defendant may demur to the complaint, where one or more of the following objections thereto appear upon the face thereof.

1. That the court has not jurisdiction of the person of the defendant.
2. That the court has not jurisdiction of the subject of the action.
3. That the plaintiff has not legal capacity to sue.
4. That there is another action pending between the same parties, for the same cause.
5. That there is a misjoinder of parties plaintiff.
6. That there is a defect of parties, plaintiff or defendant.
7. That causes of action have been improperly united.
8. That the complaint does not state facts sufficient to constitute a cause of action.

SEC. 490. The demurrer must distinctly specify the objections to the complaint; otherwise it may be disregarded. An objection, taken under subdivision first, second, fourth, or eighth of section four hundred and eighty-eight of this act, may be stated in the language of the subdivision; an objection, taken under either of the other subdivisions, must point out specifically the particular defect relied upon.

<sup>1</sup> In *Milroy v. Hensley*, 2 Bibb (Ky.), 20, the court said: "The rule in this respect seems to be, that on a special demurrer the party can take no advantage of any other defect of form than what he hath expressed in his demurrer, but that he may of matters of substance, whether particularly alleged or not."

In *State v. Covenhoven*, 1 Halst. (N. J.), 396, p. 401, the court said: "Another observation may here be made, in answer to what was dropped by one of counsel, on the argument. It was said that on a special demurrer, no objection can be taken to what is not particularly specified in the demurrer, and, therefore, that the prosecution is precluded from urging some of the objections which have been made. The observation, so far as it relates to formal defects, is correct, and warranted by the statute, but defects of substance may be taken advantage of at any time."

In England by the Common Law Procedure Act, 1852 (15 & 16 Vict., c. 76, sec. 51), it was held that "no pleading shall be deemed insufficient for any defect which could heretofore only be objected to by special demurrer."

There has been similar legislation in most of the states in this country. — ED.

SEC. 492. The defendant may demur to the whole complaint, or to one or more separate causes of action, stated therein. In the latter case, he may answer the causes of action not demurred to.

SEC. 493. The defendant may also demur to the reply, or to a separate traverse to, or avoidance of, a defence or counterclaim, contained in the reply, on the ground that it is insufficient in law, upon the face thereof.

SEC. 494. The plaintiff may demur to a counterclaim or to a defence consisting of new matter, contained in the answer, on the ground that it is insufficient in law, upon the face thereof.

SEC. 498. Where any of the matters enumerated in section four hundred and eighty-eight of this act as grounds of demurrer, do not appear on the face of the complaint, the objection may be taken by answer.

SEC. 499. If such an objection is not taken, either by demurrer or answer, the defendant is deemed to have waived it; except the objection to the jurisdiction of the court, or the objection that the complaint does not state facts sufficient to constitute a cause of action.

SEC. 537. If a demurrer, answer, or reply is frivolous, the party prejudiced thereby, upon a previous notice to the adverse party, of not less than five days, may apply to the court or to a judge of the court for judgment thereupon, and judgment may be given accordingly. If the application is denied, an appeal cannot be taken from the determination, and the denial of the application does not prejudice any of the subsequent proceedings of either party. Costs, as upon a motion, may be awarded upon an application pursuant to this section.

SEC. 538. A sham answer or a sham defence may be stricken out by the court, upon motion, and upon such terms as the court deems just.

SEC. 545. Irrelevant, redundant, or scandalous matter, contained in a pleading, may be stricken out, upon the motion of a person aggrieved thereby. . . .

SEC. 546. Where one or more denials or allegations contained in a pleading, are so indefinite or uncertain that the precise meaning or application thereof is not apparent, the court may require the pleading to be made definite and certain, by amendment.

SEC. 547. If either party is entitled to judgment upon the pleadings, the court may upon motion at any time after issue joined give judgment accordingly.

## RULES OF THE SUPREME COURT, 1883, ORDER XXV.

1. No demurrer shall be allowed.
2. Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the court or a judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.
3. If, in the opinion of the court or a judge, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counterclaim, or reply therein, the court or judge may thereupon dismiss the action or make such other order therein as may be just.
4. The court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.

SMITH *et al.* v. SUMMERFIELD *et al.*

SUPREME COURT OF NORTH CAROLINA. 1891.

[Reported 108 *North Carolina*, 284.]

SHEPHERD, J.<sup>1</sup> . . . The third and fourth grounds of demurrer are untenable. A demurrer does not lie except in the cases specifically mentioned in section 239 of The Code. *Dunn v. Barnes*, 73 N. C., 273. Redundancy and impertinence in pleading must be objected to by way of motion before answer or demurrer (*Best v. Clyde*, 86 N. C., 4), and the same is true as to argumentativeness, "indefiniteness or uncertainty, unless the uncertainty be such as to state no cause of action." Boone Code Pl., 54, 146.<sup>2</sup> . . .

<sup>1</sup> Only a part of the opinion of the court is given. — Ed.

<sup>2</sup> See *Union Bank v. Bell*, 14 Oh. St. 200.

Under the codes duplicity is not a ground of demurrer or motion to strike out. The remedy is by motion to compel the party to separate his causes of action or defense. *Hendry v. Hendry*, 32 Ind. 349.

So as to all defects of form, a motion and not a demurrer is, under the codes, the proper remedy. *Pomeroy*, Code Remedies, 4th ed., pp. 595 *et seq.*, 708 *et seq.* In *Morse v. Gilman*, 16 Wis. 504, p. 507, the court said: "A complaint to be overthrown by a demurrer or objection to evidence, must be wholly in-

[*Form of Notice of Motion that Complaint be made Definite and Certain.*]

Supreme Court of the State of New York,  
County of New York.

|                   |   |                  |
|-------------------|---|------------------|
| A. B., Plaintiff, | } | Notice of Motion |
| against           |   |                  |
| C. D., Defendant. |   |                  |

Sir:

PLEASE TAKE NOTICE, that on the complaint herein, the undersigned will move this court at a Special Term, Part I, thereof, to be held in the County Court House in New York County on....., 19....., at 10:30 o'clock in the forenoon of said day, or as soon thereafter as counsel may be heard, for an order

1. Directing that the complaint be made definite and certain by amendment so as to (*Here state in what respects the complaint should be amended*); and

2. Granting to the defendant such other and further relief as may be just.

Dated, ....., 19.....

Yours, &c.,

X. Y., Attorney for Defendant.

(Address)

To V. W., Esq., Attorney for Plaintiff.

[*Form of Order.*]

At a Special Term, Part I thereof, of the Supreme Court of the State of New York, held in the courtroom thereof in the County Court House, New York County, on the.....day of....., 19.....

PRESENT:

Hon. E. C. C.,

JUSTICE.

|                   |   |
|-------------------|---|
| A. B., Plaintiff, | } |
| against           |   |
| C. D., Defendant. |   |

sufficient. If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if a good cause of action can be gathered from it, it will stand, however inartificially these facts may be presented, or however defective, uncertain or redundant may be the mode of their statement. Contrary to the common law rule, every reasonable intendment and presumption is to be made in favor of the pleading, and it will not be set aside on demurrer unless it be so fatally defective, that, taking all the facts to be admitted, the court can say they furnish no cause of action whatever." — ED.



On reading and filing the notice of motion herein, dated....., 19....., and the complaint herein, verified ....., 19....., and after hearing X. Y., Esq., counsel for the defendant, in support of the motion, and V. W., Esq., counsel for the plaintiff, in opposition thereto, it is, on motion of X. Y., attorney for the defendant,

ORDERED that the said motion be and the same hereby is granted, with ten dollars costs to the defendant, and the plaintiff is hereby directed to serve, within twenty days after the service upon his attorneys of a copy of this order with notice of entry, an amended complaint which shall (*Here state in what respects the complaint should be amended*).

Enter:

E. C. C.

J. S. C.

LEE v. MINNEAPOLIS & ST. LOUIS RAILWAY  
COMPANY.

SUPREME COURT OF MINNESOTA. 1885.

[Reported 34 *Minnesota*, 225.]

MITCHELL, J. This appeal is from an order denying a motion to make the complaint more definite and certain. The action was for damages caused by the alleged negligence of defendant in leaving exposed and unguarded in its yard at Albert Lea a receptacle for boiling water, into which, on the 24th day of November, 1883, the plaintiff fell, while he "was lawfully upon said premises by the invitation of the defendant, having been invited there by said defendant to obtain employment." This the defendant asked to have made more definite and certain by stating how said invitation was extended to the plaintiff, and the name and occupation of the person or agent representing the defendant who extended it. In an affidavit presented by the defendant it was stated, as a reason for making the motion, that for the past two years there had been employed in and about the premises referred to an average of more than 40 men daily; that such employes were constantly changing, many going away and others taking their places; and that it was utterly impossible for defendant to know or ascertain who the person was upon whose invitation the plaintiff relies. No point is made that there is any uncertainty as to whether the pleader intended to allege an express invitation, or merely a license to enter. Defendant construes it to be the former, and what he

complains of is that the pleading does not allege the name or occupation of the agent who gave the invitation.

The uncertainty is not as to what the complaint alleges, but as to the particular evidence which plaintiff will produce to sustain it. But we apprehend that the indefiniteness or uncertainty to be relieved against on motion is only such as appears on the face of the pleading itself, and not an uncertainty arising from some extrinsic facts as to what evidence will be produced to support it. This latter uncertainty is incident to all litigation, and is one against which the law cannot provide except to say that the proof must correspond with the allegations. It might be convenient for defendant to be informed of the name of the alleged agent who extended this invitation, but to require it to be stated in the complaint would be to establish a novel rule of pleading. What a person does by another he does himself, and things may be pleaded according to their legal effect and operation, and it was perfectly good pleading to allege that the plaintiff was invited upon the premises "by defendant."

*Order affirmed.*

OLSEN v. CLOQUET LUMBER COMPANY and  
Another.

SUPREME COURT OF MINNESOTA. 1895.

[Reported 61 *Minnesota*, 17.]

THE complaint alleged in substance that at the times mentioned defendant company was a corporation and defendant George S. Shaw was its president and general manager; that on April 5, 1893, plaintiff with her husband and their child was occupying a dwelling house which constituted plaintiff's homestead, and had been occupying it for more than six years; that on said day defendant corporation and defendant Shaw, acting in his said capacity, did by its and his employés and servants, acting under its and his direction, wrongfully and willfully, and in gross disregard of plaintiff's rights, attack said dwelling house, tear down and destroy a large portion thereof and render it uninhabitable; that by reason of said attack plaintiff was rendered temporarily insane and had ever since sickened and suffered from the effects of the nervous shock occasioned by said attack, and was sick and in bed under the care of physicians and nurses, and that by reason of the premises she had been damaged in the sum of \$5000.

START, C. J. Appeal from orders striking out the separate demurrer of each defendant to the plaintiff's complaint as frivolous. A demurrer should not be struck out as frivolous unless it is manifest, without argument, from a mere inspection of the pleading, that there was no reasonable ground for interposing it. It should not be struck out where there is such room for debate as to the sufficiency of the pleading demurred to that an attorney of ordinary intelligence might have interposed a demurrer in entire good faith. *Hatch & Essendrup Co. v. Schusler*, 46 Minn. 207, 48 N. W. 782. It is far from manifest, from an inspection of the complaint, without argument, that it states a cause of action, so as to make the demurrer frivolous within this rule; on the contrary, after serious consideration of its allegations, we are unable to agree that it states any cause of action. It states no cause of action for damages on account of personal injuries to the plaintiff, for it is not alleged that she was in or near the house when the attack was made upon it. A majority of the court are of the opinion that a cause of action for nominal damages to the plaintiff's homestead may be spelled out of it. Clearly the demurrers were not frivolous.

*Orders reversed.*<sup>1</sup>

### WHITE v. MOQUIST.

SUPREME COURT OF MINNESOTA. 1895.

[Reported 61 *Minnesota*, 103.]

MITCHELL, J. The allegations of the complaint were that plaintiff leased certain premises to defendant for a year, at an agreed rent of \$200, payable one-half May 15, 1894, and the other half August 15, 1894, and that defendant has only paid \$90. Judgment was asked for \$110. The defendant, in his answer, denied that there was any greater sum than \$85 due plaintiff for rent, and alleged that "plaintiff has been paid in cash and other personal property, consisting of hay, in the aggregate the sum of \$115." This answer was verified by defendant's attorney. The answer was, on motion of plaintiff, stricken out as sham. In support of his motion, plaintiff made an affidavit that all the cash defendant had paid was \$90, which was paid on the first instalment of rent; that the only facts relating to the payment of hay were that, in the latter part of June, plaintiff, with the permission of defendant,

<sup>1</sup> See 6 *Encyc. of Pl. and Pr.* 385. — Ed.

cut some hay growing on the street in front of the leased premises; that the amount thus cut did not exceed 1,500 pounds, and was not worth to exceed \$3; that plaintiff never promised to pay defendant anything therefor, and that defendant never made any demand or claim on account of the same until after the second instalment of rent was due; that plaintiff never received from defendant any other cash or personal property except as above stated. The defendant presented no counter affidavits.

While a court should be exceedingly careful not to strike out a pleading as sham except where its falsity is clearly established, yet, upon the showing made in this case, we think the court was justified in striking out this answer. Its allegations as to how payment had been made — how much in cash, and how much in hay — were exceedingly indefinite, and apparently evasive. The pleading was verified by the attorney, who may have had no personal knowledge of the facts. To plaintiff's affidavit, the contents of which were quite minute and specific, the defendant interposed neither denial nor explanation. As was suggested in *Van Loon v. Griffin*, 34 Minn. 444, 26 N. W. 601, it would be imposing no great hardship on defendant to require him to explain or dispute plaintiff's statements, and, if he omits to do so, to take them as true.

*Order affirmed.*<sup>1</sup>

## HENEY v. CHARTERED COMPANY OF LOWER CALIFORNIA.

SUPREME COURT OF NEW YORK, SPECIAL TERM. 1911.

[Reported 71 *Miscellaneous Reports*, 237.]

LEHMAN, J. The complaint alleges that the plaintiff is a resident of the State of New York and that the defendant is a foreign corporation organized under the laws of the State of Maine. The defendant demurs to the complaint on the grounds that the court has not jurisdiction of the person of the defendant and that the court has not jurisdiction of the subject of the action.

<sup>1</sup> See *Wayland v. Tysen*, 45 N. Y. 281.

An answer will not be held frivolous, unless it is "so clearly and palpably bad as to require no argument or illustration to show its character." *Hull v. Carter*, 83 N. C. 249.

The power to strike out or give judgment upon pleadings as sham or frivolous exists independently of statute. *State Mutual B. & L. Ass'n v. Williams*, 78 N. J. L. 720, 75 Atl. 927. — Ed.



There can be no doubt that the court has jurisdiction of the subject of the action under section 1780 of the Code. The arguments of the defendant are directed solely to the ground that the court has no jurisdiction of the person of the defendant. In the case of *Nones v. Hope Mutual Life Ins. Co.*, 8 Barb. 541( see 5 How. Pr. 96), it was held that " the meaning of the clause ' that the court has no jurisdiction of the person ' is that the person is not subject to the jurisdiction of the court and not that the suit has not been regularly commenced," and that, therefore, a defendant foreign corporation cannot by demurrer raise the objection that the summons was not properly served on it. This case was cited and approved in the case of *Ogdensburgh R. R. Co. v. Vermont R. R. Co.*, 16 Abb. Pr. 249; and that case, although only a Special Term decision, was approved in the case of *Belden v. Wilkinson*, 44 App. Div. 420. Since the defendant is in this case really raising only the issue that it has not been properly served, it would appear beyond question that the demurrer is not the appropriate remedy and should be overruled, were it not that the case of *Ogdensburgh R. R. Co. v. Vermont R. R. Co.* decided that a foreign corporation cannot be cited to appear in the courts of this State; and that the court can obtain no jurisdiction to render a personal judgment, except by voluntary appearance, and such a corporation is, therefore, not subject to the jurisdiction of the court, except as to property within the State; and that the objection to the jurisdiction may, therefore, be raised by demurrer. That case was decided in 1874; and thereafter the Court of Appeals decided, in the case of *Gibbs v. Queens Fire Insurance Co.*, 63 N. Y. 114, that the Code had changed the common-law rule, and that a foreign corporation was subject to the general jurisdiction of the court where personal service was made as directed in the Code. In the case of *Pope v. Terre Haute Manufacturing Co.*, 87 N. Y. 137, 139, it was held that " It is undisputed that foreign corporations may be sued in this State, section 1780 of the Code of Civil Procedure, providing that ' an action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action.' It has never been doubted that the legislature could constitutionally authorize the commencement of such an action." The conflict of decisions between our courts and the Federal courts is not over the question of whether a foreign corporation is subject to the jurisdiction of the court, but only on the question of the validity of attempted service. See *Grant v. Cananea Con. Copper Co.*, 189 N. Y. 241.

Demurrer should be overruled, with leave to the defendant to answer within twenty days after notice of entry of the interlocutory judgment.

*Demurrer overruled.*<sup>1</sup>

LOAN & TRUST SAVINGS BANK *v.* STODDARD *et al.*,  
Inpleaded with HOLCOMB BROS. *et al.*

SUPREME COURT OF NEBRASKA. 1902.

[Reported 2 *Nebraska, Unofficial*, 486.]

DAY, C.<sup>2</sup> . . . At the commencement of the trial the appellants objected to the introduction of any testimony in the case on behalf of the plaintiff for the reason that the petition did not state a cause of action, and for the further reason that no legal capacity was shown in the plaintiff to maintain the suit. The point urged is that there was no allegation of the corporate capacity of the plaintiff. In *Angel and Ames, Corporations*, section 632, it is said: "It is, however, generally admitted, that a corporation may declare in its corporate name, without setting forth in the declaration the act of incorporation, or averring that it is a corporation, if the act be private." At common law a corporation may sue and be sued in its corporate name, without an averment of its corporate capacity, and the provisions of our Code have not changed the common law rule in that regard. *Exchange National Bank v. Capps*, 32 Neb., 242. In *Holden v. Great Western Elevator Co.*, 72 N. W. Rep. [Minn.], 805, it is held: "In an action by or against a corporation it is not necessary to allege that it is a corporation, except in cases where the fact of corporate existence enters into, and constitutes a part of, the cause of action itself." *Stanley v. Richmond & D. R. Co.*, 89 N. Car., 331.

<sup>1</sup> On the question of jurisdiction of the subject of the action, see *Bruheim v. Stratton*, 145 Wis. 271, 129 N. W. 1092, *supra*, p. 105.

In *Doll v. Feller*, 16 Cal. 432, 433, the court said: "A demurrer to the jurisdiction of the Court only lies where the want of such jurisdiction appears affirmatively upon the face of the complaint. In a Court of limited and special jurisdiction, the rule is otherwise; there, every fact essential to confer the jurisdiction must be alleged. In Courts of general jurisdiction the cause of action need only be stated, and the want of jurisdiction, arising from the insufficient value of the premises, must be taken advantage of in some other way." — Ed.

<sup>2</sup> A part of the opinion is omitted. — Ed.

The decree rendered by the trial court is fully sustained by the proofs. We therefore recommend that the judgment of the district court be affirmed.

HASTINGS and KIRKPATRICK, C.C., concur.

*Affirmed.*<sup>1</sup>

HOLCOMB, J., took no part in the decision.

BENNETT *v.* PRESTON and Others.

SUPREME COURT OF INDIANA. 1861.

[Reported 17 *Indiana*, 291.]

PERKINS, J. James H. Bennett sues William R. Preston and others, and charges in his complaint that he was indebted to divers persons in a fraction over \$3000; and that being unable to pay the debts at maturity, but having plenty of property to secure them, he did, on November 14, 1857, assign to said William R. Preston, and certain others named, his real and personal property, of the value of near \$5000, making them a title to, and putting them in possession of, the same, to be used by them for the payment of the above mentioned debts.

He further charges, that for three years the assignees have continued in possession of the trust committed to them; that they have neglected their duty; that they have wasted and sacrificed the personal property, or converted it to their own use; that they have suffered solvent choses in action to remain uncollected till lost; that they have used the real estate for their own private convenience and profit, &c.; and, if they have paid the debts, have wasted, and are wasting, the surplus, &c. He further charges, that he has demanded an accounting and settlement, and the payment over to him of \$2500, which sum should remain in their hands after payment of all debts and expenses. He prays for a judgment against the assignees for that sum, "and for other proper relief." He makes the creditors provided for in the deed of assignment defendants, with the assignees, and the deed of assignment is set out in the complaint. He adds a second paragraph to his complaint, upon a separate cause of action, for work and labor, &c.

<sup>1</sup> See *Phoenix Bank v. Donnell*, 40 N. Y. 410; *Cheraw & Chester R. R. Co. v. White*, 14 S. C. 51; *Central Bank of Wis. v. Knowlton*, 12 Wis. 624.

It is clear that an allegation of the plaintiff's corporate existence is sufficient without any allegation of its corporate power to sue. *Northrup v. Wills*, 65 Kan. 769, 70 Pac. 879; *Smith v. Weed Sewing Machine Co.*, 26 Oh. St. 562; *Cone Co. v. Poole*, 41 S. C. 70, 19 S. E. 203, 24 L. R. A. 289; *Crane Brothers Mfg. Co. v. Reed*, 3 Utah, 506, 24 Pac. 1056. — Ed.

The Court below sustained a joint demurrer, by all the defendants, to the complaint, and dismissed the suit.

Three causes of demurrer were assigned: 1. Want of sufficient facts to constitute a cause of action. 2. Misjoinder of causes of action. 3. Misjoinder of parties defendants, in this, that there were too many defendants.<sup>1</sup> The third cause of demurrer was not well assigned. It was not available. Defect of parties, under the Code, as a cause of demurrer, means too few, not too many parties; and a demurrer bad in part, is bad altogether. Voorhies' Code, 6 ed. p. 196; Ind. Dig., p. 650. The demurrer in this case was bad, in part, because if "a complaint state a cause of action against one or more of several defendants, a joint demurrer by all the defendants, on the ground that the complaint does not state facts sufficient, or for defect of parties, cannot be sustained. But the defendants against whom no cause of action is stated, may demur on that ground, separately." *Eldridge v. Bell*, 12 How. (N. Y.) Rep. 549; id. 1756; 8 id. 392; 2 Abb. 402; Voorhies' Code, 6 ed. 196. Or they may be discharged on the trial. *Draper v. Vanhorn*, 15 Ind. 155. . . .

*Per Curiam.* The judgment is reversed, with costs. Cause remanded for further proceedings, with leave to amend, &c.<sup>2</sup>

### HARRIS v. AVERY.

SUPREME COURT OF KANSAS. 1869.

[Reported 5 *Kansas*, 146.]

*By the Court*, VALENTINE, J. This action was brought in the court below by Avery, as plaintiff. The petition states two causes of action — false imprisonment and slander — and alleges that

<sup>1</sup> Only that part of the opinion of the court which relates to the third ground of demurrer is here given. — ED.

<sup>2</sup> See Ames, *Cases on Pleading*, ed. of 1905, p. 135; 15 *Encyc. of Pl. and Pr.* 762.

In some states the codes allow misjoinder of defendants as a ground of demurrer. But even in some of those states the parties properly joined cannot object to the misjoinder. *Gardner v. Samuels*, 116 Cal. 84, 47 Pac. 935; *Pomeroy*, *Code Remedies*, 4th ed., p. 275.

Compare the English rule, *Rules of the Supreme Court*, 1883, Order XVI, rules 11-13, *supra*, p. 166; and the New Jersey rule, *New Jersey Practice Act* (1912), sec. 9, *supra*, p. 170.

At common law in actions *ex contractu* any or all of the defendants may on a general demurrer take advantage of a misjoinder of defendants apparent in



both arose out of the same transaction. Harris demurred to this petition, on the ground "that it appears on the face of the petition, that several causes of action are improperly joined." The district court overruled the demurrer, and this ruling is assigned as error.

The petition shows that the two causes of action are founded upon the following facts. Harris met Avery in the city of Fort Scott, and in the presence of several other persons called Avery a thief; said he had a stolen horse; took the horse from Avery, and kept the horse four or five days; arrested Avery and confined him in the county jail with felons four or five days.

We think these facts as detailed in the petition constitute only one transaction, [*Brewer v. Temple*, 15 Howard Pr. R., 286]; and whether they constitute more than one cause of action, under our code practice, may be questionable. Under the authority we have referred to they would not. But as we have not been asked to decide the latter question, we will pass it over and treat the case as though the facts stated constitute two causes of action.

Section 89 of the code [Comp. Laws, 138], provides "that the plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both, when they are included in either one of the following classes: First, the same transaction or transactions connected with the same subject of action."

This differs in many respects from the common law rule. At common law "where the same form of action may be adopted for several distinct injuries, the plaintiff may, in general, proceed for all in one action, though the several rights effected were derived from different titles," [1 Chitty's Pl., 201; Tidd's Pr., 11], and different forms of action may be united "where the same plea may be pleaded and the same judgment given on all the counts of the declaration, or whenever the counts are of the same nature, and the same judgment is to be given on them although the pleas be different." 1 Chitty's Pl., 200.

In the action at bar, if Harris had arrested Avery on a warrant, which Harris had maliciously and without probable cause obtained from a court of competent jurisdiction, and had also converted the horse to his own use, then at common law, Avery would have had three distinct causes of action, which he could unite in one suit—first, an action for the false imprisonment or malicious declaration. *Cunningham v. Town of Orange*, 74 Vt. 115, 52 Atl. 269; 1 Chitty, Pleading, 16th Am. ed., \* 51; Dicey, Parties, 506. As to actions *ex delicto*, see 1 Chitty, Pleading, 16th Am. ed., \* 97; Dicey, Parties, 508. — Ed.

prosecution; second, an action of slander for the words spoken, and third, an action of trover for the conversion of the horse. These may all be united in an action on the case [1 Chitty's Pl., 133, 134, 146; 1 Tidd's Pr., 5]; trover being a species of case. Avery might, also, at common law, unite with these causes of action as many other causes of action as he might have, for malicious prosecution, slander, trover, criminal conversation, nuisance, and other causes of action which may be sued in an action on the case, and although they each may have arisen out of a different transaction, and at a different time, and in a different place.

But if Harris arrested Avery without any process — which was the fact in this case — and in an entirely irregular manner, then the two causes of action for false imprisonment and slander could not at common law be united, as the first would have to be sued in an action of trespass and the second in an action on the case, and it would make no difference whether they both arose out of the same transaction or not.

Our code has abolished all the common law forms of action, and has established a system for the joinder of actions, — more philosophical, and complete within itself. It follows the rules of equity more closely than it does those of the common law, one object seeming to be to avoid the multiplicity of suits, and to settle in one action, as equity did, as far as practicable, the whole subject matter of a controversy. Hence the common law on this question is no criterion. It is probably true that the two causes of action for false imprisonment and slander cannot, under our code, be united, unless both arise out of the same transaction, one being an injury to the person and the other being an injury to the character; but we do not know of any reason why they should not be united when both do arise out of the same transaction.

It is claimed by counsel for plaintiff in error that the earlier reports of the New York code are against this view of the case. He refers to 8 Howard's Pr. R., 59, 73; 9 Howard's Pr. R., 113; 1 Duer, 629. We think it questionable whether these cases sustain the counsel's views; but if they do, the later decisions under the same code are squarely against him. See *Brewer v. Temple*, 15 Howard's Pr. R., 286; *Robinson v. Flint*, 16 Howard's Pr. R., 240. In the latter case the court, as we think, expresses the true rule. They say "that the plaintiff may unite, first, as many legal causes of action as he pleases arising out of the same transaction; second, as many equitable causes of action as he pleases arising out of the same transaction; third, as many legal and equitable causes of

action as he pleases arising out of the same transaction; fourth, as many causes of action as he pleases arising out of different transactions connected with the subject of the action."

The order of the district court overruling the demurrer to the petition is affirmed.

All the justices concurring.<sup>1</sup>

#### GENERAL STATUTES OF KANSAS, 1909.

SEC. 5681. The plaintiff may unite several causes of action in the same petition, whether they be such as have been heretofore denominated legal or equitable, or both. But the causes of action so united must affect all the parties to the action, except in actions to enforce mortgages or other liens.<sup>2</sup>

#### THE NEW JERSEY PRACTICE ACT (1912).

SEC. 17. The court may, under such conditions as it may fix, require any or all motions preliminary to trial to be heard and determined by Supreme Court Commissioners designated by the the Court, and may fix their fees which shall be costs in the cause.

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### SECTION II.

#### *Pleas or Answers.*

#### NEW YORK CODE OF CIVIL PROCEDURE.

SEC. 500. The answer of the defendant must contain:

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.
2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language without repetition.

<sup>1</sup> But see *De Wolfe v. Abraham*, 151 N. Y. 186, 45 N. E. 455. — Ed.

<sup>2</sup> In England by the Rules of the Supreme Court, 1883, Order XVIII, rule 1, it is provided that "Subject to the following Rules of this Order, the plaintiff may unite in the same action several causes of action; but if it appear to the Court or a Judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or Judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof." — Ed.

## MASSACHUSETTS REVISED LAWS, CHAPTER 173. '

SEC. 24. The answer shall deny in clear and precise terms every substantive fact which is intended to be denied in each count of the declaration separately, or it shall declare the defendant's ignorance of the fact, so that he can neither admit nor deny but leaves the plaintiff to prove the same.

SEC. 27. An answer shall state clearly and precisely each substantive fact which is intended to be relied upon in avoidance of the action, and if it sets up the statute of limitations, the statute of frauds or any other legal bar, the defendant shall have the benefit of such defence although the answer does not deny the facts set forth in the declaration.

## COLES v. SOULSBY.

SUPREME COURT OF CALIFORNIA. 1862.

[Reported 21 *California*, 47.]

FIELD, C. J., delivered the opinion of the Court — Cope, J., and Norton, J., concurring.

This is an action to recover of the defendant the sum of \$7890, being the amount of certain proceeds received by him from an interest in a quartz vein belonging to the plaintiff. The interest constituted the separate property of the plaintiff, who is a married woman, and the proceeds were received by the defendant previous to her marriage. The complaint is special and verified, and it is admitted that on the trial the plaintiff proved her case as it is there stated. The answer, with the exception of an averment as to an offset of three hundred dollars, amounts only to a denial of the allegations of the complaint. The defense upon which the defendant relied on the trial was an accord and satisfaction. . . .

[The plaintiff objected to the evidence of accord and satisfaction introduced by the defendant. His objection was overruled, and a verdict and judgment passed for the defendant. The plaintiff appeals.]<sup>1</sup>

In our practice, a denial, whether general or special, only puts in issue the allegations of the complaint. The difference between a general and special denial in this respect is only in the extent to

<sup>1</sup> The statement of the facts by the court is abridged and parts of the opinion are omitted. — Ed.



which the allegations are traversed. New matter must be specially pleaded; and whatever admits that a cause of action, as stated in the complaint, once existed, but at the same time avoids it — that is, shows that it has ceased to exist — is new matter. It is that matter which the defendant must affirmatively establish. Such are release, and accord and satisfaction. Defenses of this character must be distinctly set up in the answer, or evidence to establish them will be inadmissible. This view disposes of the appeal and necessitates a reversal of the judgment. . . .

*Judgment reversed and cause remanded.*<sup>1</sup>

MARSHALL-WELLS HARDWARE COMPANY *v.*  
EMDE.

SUPREME COURT OF MINNESOTA. 1913.

[Reported 121 *Minnesota*, 524.]

ACTION in the district court for Swift county to recover \$1498 for certain goods, wares and merchandise. The answer was a general denial. The case was tried before Qvale, J., who directed a verdict in favor of plaintiff for the amount demanded. From an order denying defendant's motion for a new trial, he appealed.

*Affirmed.*

PER CURIAM. This is an action to recover the purchase price for goods sold and delivered to the Farmers' Lumber & Supply Company, a copartnership composed of the defendant and one Small. After the delivery of the goods, the copartnership was dissolved by mutual agreement, and the defendant took over the business of the firm, and, as a part of the transaction, assumed and agreed to pay the liabilities of the firm, including the claim in suit. These facts were not controverted on the trial. The defendant himself testified that he executed the written agreement whereby he assumed the liabilities of the firm, and also that he notified the wholesale house that he had taken over the business and would pay and settle the claim now in suit.

The defendant's answer was a general denial, and nothing more. The only defense that he sought to present under it was that his copartner, Small, and his own attorney, had made certain misrepresentations in the transactions attending the dissolution of the copartnership. The evidence proffered to support this contention

<sup>1</sup> See *Jacobs v. Day*, 5 N. Y. Misc. 410, 25 N. Y. Supp. 763, *accord*. — Ed.

was excluded. In excluding this evidence the trial court was clearly correct, even if the evidence offered had been sufficient to establish fraud, which is doubtful. Where the execution of an instrument or the making of a contract is admitted, and the obligor seeks to avoid its effect on the ground of fraud, he must allege the facts constituting the fraud. He cannot prove them under a general denial. *Daly v. Proetz*, 20 Minn. 363 (411); *Livingston v. Ives*, 35 Minn. 55, 27 N. W. 74; *MacFee v. Horan*, 40 Minn. 30, 41 N. W. 239; *Morrill v. Little Falls Mfg. Co.*, 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174; *Christianson v. Chicago, St. P. M. & O. Ry. Co.*, 61 Minn. 249, 63 N. W. 639; *Trainor v. Schutz*, 98 Minn. 213, 107 N. W. 812.

*The order appealed from is affirmed.*<sup>1</sup>

DODGE and Others v. McMAHAN.

SUPREME COURT OF MINNESOTA. 1895.

[Reported 61 *Minnesota*, 175.]

MITCHELL, J.<sup>2</sup> This was an action to recover money "loaned to the defendant, and paid for his use and benefit." The answer was a general denial. . . .

The court excluded certain evidence offered by defendant for the alleged purposes of proving that the transaction was not an actual purchase of wheat, but a mere wager by him on the future price of the commodity. The evidence was properly excluded for two reasons: First, it went merely to the unexpressed intention or motive of defendant himself, of which plaintiffs had no knowledge, either when they bought the wheat or when they made the advances for him; second, it was inadmissible, under the pleadings. Authorities may be found, even in some of the code states, to the effect that, under a mere denial, evidence of any fact may be given in evidence that would go to the original validity of the contract sued on, — that is, which, although admitting the making of the contract, would show that, when made, it was for some reason invalid; as, for example, that it was made on Sunday, or that it was a gambling or wagering contract. But this rule is not in accordance with either the spirit of the reformed procedure or the decisions of this court. The correct rule is that, under a denial, the

<sup>1</sup> *De Lucia v. Valente*, 83 Conn. 107, 75 Atl. 150, *accord*. — Ed.

<sup>2</sup> A part of the opinion is omitted. — Ed.

defendant is at liberty to give only such evidence as tends to disprove the existence of the facts, as facts, alleged by the plaintiff, but not of any matter *aliunde*, which, although admitting such facts, would tend to avoid their legal effect and operation. *Finley v. Quirk*, 9 Minn. 179 (194); *Brown v. Eaton*, 21 Minn. 409; *Lautenschlager v. Hunter*, 22 Minn. 267; Bliss, Code Pl. § 352. The cases holding that where a plaintiff alleges generally his ownership of property, without setting out the source of his title, the defendant may give evidence of any facts tending to disprove such ownership, so far from being in conflict with this rule, are in exact accord with it. . . .

*Order affirmed.*<sup>1</sup>

### MARTIN *v.* SOUTHERN RY.

SUPREME COURT OF SOUTH CAROLINA. 1897.

[Reported 51 *South Carolina*, 150.]

THIS is an action for personal injury alleged to have been caused by the defendant's negligence. The answer denied all the allegations of the complaint except the corporate existence of the defendant. The jury rendered a verdict in favor of the plaintiff for \$266. The defendant appealed upon exceptions.<sup>2</sup>

GARY, J. . . . The fourth exception is as follows: 4. "Excepts because the presiding Judge erred, as a matter of law, in charging the jury as follows: 'Contributory negligence, which you have heard the lawyers discuss here, is a matter that must be set up in the answer to be proved upon the defense, and it cannot be proved under a general denial. An affirmative matter of defense must be pleaded, else the proof will not be allowed to be introduced; or if it does come into the case, it will not be considered a matter of defense under the pleadings. Therefore, Mr. Foreman, the matter of contributory negligence is not pleaded here at all'; whereas it is

<sup>1</sup> *Raymond v. Phipps*, 215 Mass. 559, 102 N. E. 905, *accord*.

THE STATUTE OF FRAUDS. The statute of frauds is generally held to be an affirmative defense. *Citty v. Manufacturing Co.*, 93 Tenn. 276, 24 S. W. 121.

If it affirmatively appears on the face of the complaint that the contract is unenforceable because not complying with the requirements of the statute of frauds, the defendant should demur to the complaint. See *Elliott v. Jenness*, 111 Mass. 29; *Crane v. Powell*, 139 N. Y. 379, 34 N. E. 911; *Seamans v. Barentsen*, 78 N. Y. App. Div. 36, 79 N. Y. Supp. 212. — Ed.

<sup>2</sup> The statement of facts is taken from the opinion and is abridged. A part of the opinion together with the dissenting opinion of Melver, C. J., is omitted. — Ed.

submitted, that while contributory negligence is a matter of defense, yet such defense may be shown under a general denial." This question is disposed of by the decision in the case of *Wilson v. Charleston and Savannah Railway Co.*, recently rendered by this Court, in which it was held that contributory negligence is a defense which must be set up in the answer.

For these reasons, I am of the opinion that the judgment of the Circuit Court should be affirmed.

As Mr. Justice Pope and Mr. Justice Jones concur in this opinion, the judgment of the Circuit Court is affirmed.<sup>1</sup>

## JENKINS v. STEANKA.

SUPREME COURT OF WISCONSIN. 1865.

[Reported 19 *Wisconsin*, 126.]

*By the Court*, DOWNER, J.<sup>2</sup> This is an action to recover forty thousand feet of pine lumber, alleged in the complaint to be wrongfully detained by the defendant, and of the value of \$400. The value is not denied by the answer. At the trial, the plaintiffs offered to prove the value less than \$400; but the circuit court refused to permit the evidence to be given, holding that the pleadings fixed and were conclusive as to the amount of the value. In this the court below erred. In actions of trover, trespass or replevin, before the code, it was not necessary for the defendant to deny the amount of the value or the allegation of damages, and in this respect the code has not altered the practice. They must be proved even though the defendant puts in no answer. *Conness v. Main*, 2 E. D. Smith, 314; *McKenzie v. Farrell*, 4 Bosworth, 202. . . .

*Judgment of the court below reversed, and a new trial ordered.*<sup>3</sup>

<sup>1</sup> In some states the plaintiff must allege in his declaration his own due care. In such states, his contributory negligence is of course put in issue by a general denial.

In general as to what matters should be pleaded affirmatively, see *Pomeroy*, *Code Remedies*, 4th ed., pp. 788 *et seq.*

No attempt is here made to show the scope of the *general issue* in the United States or in England, either before or after the Hilary Rules. See *Piercy v. Sabin*, 10 Cal. 22. — ED.

<sup>2</sup> Only a part of the opinion is here given. — ED.

<sup>3</sup> See *Odgers*, *Pleading*, 7th ed., 218.

Failure to deny does not admit matters of aggravation. *Gould*, *Pleading*, 2d ed., p. 365. — ED.



LEVITT and LEVITT *v.* O'ROURKE ENGINEERING  
CONSTRUCTION COMPANY.SUPREME COURT OF NEW YORK, APPELLATE DIVISION,  
FIRST DEPARTMENT. 1913.[Reported 160 *New York Appellate Division*, 869.]

APPEAL from an interlocutory judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 17th day of July, 1913, overruling a demurrer to a separate defense.

PER CURIAM: The complaint states a single cause of action. The different items of damage are set forth in separate paragraphs. The defendant pleaded, as a separate and distinct defense to the cause of action set forth in the 4th paragraph of the complaint, that after its alleged occupation the plaintiffs accepted from the owner of the land \$200 in full payment of "any and all claims . . . for or on account of such alleged occupation." This is not a complete defense and does not purport to be a defense of any item of damage other than that set forth in the 4th paragraph of the complaint. It is at most a partial defense and to be good should have been pleaded as such. The plaintiffs' demurrer, upon the ground that it was insufficient in law upon its face, should, therefore, have been sustained. A complete defense, when pleaded as such, must go to the entire cause of action set out in the complaint. If it does not, then it is demurrable. The interlocutory judgment appealed from is, therefore, reversed, with costs, and the demurrer sustained, with costs, with leave to defendant to serve an amended answer on payment of costs in this court and the court below. Present — Ingraham, P. J., McLaughlin, Laughlin, Dowling and Hotchkiss, JJ. Judgment reversed, with costs, and demurrer sustained, with costs, with leave to defendant to amend on payment of costs.<sup>1</sup>

KELLER *v.* JOHNSON and Another.

SUPREME COURT OF INDIANA. 1858.

[Reported 11 *Indiana*, 337.]

DAVISON, J. The appellees, who were the plaintiffs, brought this action against Keller upon four several promissory notes, each for the payment of 180 dollars. The notes bear date April 24,

<sup>1</sup> See *Reed v. Firemen's Ins. Co.*, 76 N. J. L. 11, 69 Atl. 724; *McKyring v. Bull*, 16 N. Y. 297, 69 Am. Dec. 696; Gould, *Pleading*, 2d ed., p. 362; *Pomeroy, Code Remedies*, 4th ed., pp. 725 *et seq.*, pp. 795 *et seq.* — Ed.

1854, and are payable at three, six, nine, and twelve months, to the president and directors of the Fort Wayne and Southern Railroad Company, who assigned them to the plaintiffs.

The defendant answered —

1. That he was induced to execute the notes mentioned, &c., by the fraud, covin, and deceit of the railroad company.<sup>1</sup> . . .

There was a demurrer sustained to each paragraph of the answer; and judgment was given for the plaintiffs.

We have decided that, under the rules of pleading now in force, a general plea of fraud is not allowable. The facts constituting the defense must be set out. The first paragraph is, therefore, no defense to the action. *Webster v. Parker*, 7 Ind. R. 185. — 2 R. S. p. 42, § 66. . . .

*Per Curiam.* The judgment is affirmed, with 2 per cent damages and costs.<sup>2</sup>

### HAGGARD v. HAY'S Adm'r.

COURT OF APPEALS OF KENTUCKY. 1852.

[Reported 13 *B. Monroe*, 175.]

SIMPSON, C. J.<sup>3</sup> This is an action brought by Hay's administrator, by petition, for a debt of seventy dollars, due by note.

The defendant filed an answer to the petition, in which he admitted the execution of the note sued on, but denied that he owed the debt, or any part of it, to the plaintiff.

A demurrer to this answer was filed by the plaintiff, and sustained by the court, and the first question to be decided is as to the sufficiency of the answer.

The answer under the former mode of pleading would have amounted to a plea of *nil debit*, and would not have been good, as the suit was brought upon a note in writing, having the dignity of a specialty; and we are of opinion that the answer was insufficient under the present practice.

As the answer admitted the execution of the note, it was not sufficient for it to state that the defendant did not owe it, but it

<sup>1</sup> The opinion of the court on this paragraph of the answer alone is given. — Ed.

<sup>2</sup> But see *Laun v. Kipp*, 155 Wis. 347, 145 N. W. 183.

In an action for libel or slander, when the defamatory charge is general, a justification must state specific facts. *Fodor v. Fuchs*, 77 N. J. L. 29, 71 Atl. 108. — Ed.

<sup>3</sup> A part of the opinion is omitted. — Ed.

should have stated the facts relied upon by him, as having the effect to discharge him from all liability for the amount, so that the court could determine whether this was their legal effect, and the plaintiff might be apprized of the actual defense relied upon in the answer. The answer was therefore defective, and the demurrer to it was properly sustained. . . .

SWETT and Others *v.* SOUTHWORTH and Another.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1878.

[Reported 125 *Massachusetts*, 417.]

CONTRACT upon an account annexed for goods sold and delivered, and upon a promissory note given by the defendants to the plaintiffs. Answer: 1. A general denial. 2. "And the defendants aver that if the plaintiffs shall prove the making of the note declared on, or any of the items in the plaintiffs' bill of particulars, the same have been fully paid."

At the trial in the Superior Court, before Gardner, J., without a jury, the plaintiffs objected to the admission of any evidence of payment under this answer; but the judge overruled the objection.<sup>1</sup> . . .

ENDICOTT, J. The defence of payment is positively averred in the answer. After a general denial, "the defendants aver, that if the plaintiffs shall prove the making of the note declared on, or any of the items in the plaintiffs' bill of particulars, the same have been fully paid." The case is clearly to be distinguished from *Caverly v. McOwen*, 123 Mass. 574, and the other cases cited by the plaintiffs. . . . *Exceptions overruled.*<sup>2</sup>

<sup>1</sup> Only the opinion of the court on this objection is given. — Ed.

<sup>2</sup> Hypothetical pleas were open to objection on special demurrer at common law. *Griffiths v. Eyles*, 1 Bos. & Pul. 413; *Stephen*, Pleading, Will. ed., \* 426.

In *Mountford v. Cunard Steamship Co.*, 202 Mass. 345, 88 N. E. 782, the defendant in its answer alleged that "if the plaintiff shall introduce evidence tending to show that she was a passenger on defendant's steamer, the defendant will show that she was suffering from trachoma, and that the defendant rightfully ejected her." It was held that if no objection was taken to the answer by demurrer or motion to exclude evidence, the defect was waived. Under a somewhat similar answer in *Suit v. Woodhall*, 116 Mass. 547, it was held that the court properly excluded evidence.

See *Odgers*, Pleading, 7th ed., 157; 6 *Encyc. of Pl. and Pr.* 269. — Ed.

## FORTESCUE v. HOLT.

KING'S BENCH. 1672.

[Reported 1 *Ventris*, 123.]<sup>1</sup>

A Scire facias was brought upon a Judgment of 1000 *l.* as Administrator of J. S.

The Defendant pleaded, That before the Administration committed to the Plaintiff, viz., such a Day, etc., Administration was granted to J. N., who is still alive at D. and demandeth Judgment of the Writ.

The Plaintiff replies, J. N. died, etc., and *de hoc ponit se super Patriam*. And to what the Defendant demurs;

For that he ought to have traversed *absque hoc*, that he was alive: for though the Matter contradicts, yet an apt Issue is not formed without an Affirmative and a Negative; and so said the Court.<sup>2</sup> . . .

JUDAH v. THE TRUSTEES OF VINCENNES  
UNIVERSITY.

SUPREME COURT OF INDIANA. 1864.

[Reported 23 *Indiana*, 272.]

FRAZER, J. . . . The action was to recover the value of certain state bonds of the University, amounting to \$25,000, which it was alleged the appellant had in his hands as its agent and attorney, and which, on demand, he refused to deliver, but had sold and converted to his own use. The defendant below answered, among other things, that the University was indebted to him for professional services as attorney in a suit against the state, by which the bonds were obtained, under a special contract, evidenced on the part of the University by a resolution of its board of trustees, made and entered on its records February 8, 1853, to the effect that for such services he be allowed one-fourth of the net proceeds of the suit, to be paid to him proportionally out of such proceeds, as the same should be paid into the treasury of the board; that of

<sup>1</sup> A part of the case is omitted. — Ed.

<sup>2</sup> But see *Tomlin v. Burlace*, 1 Wils. 6, s.c. 2 Str. 1177. See Stephen, Pleading, Will. ed., \* 422.

The defect of argumentativeness is not open to a general demurrer. *Sheridan v. Sheridan*, 58 Vt. 504, 5 Atl. 494; *Walker v. Wooster's Admr.*, 61 Vt. 403, 17 Atl. 492. — Ed.



said bonds he retained \$16,625, being one-fourth, as specified in the foregoing resolution. To this part of the answer the University, by the second paragraph of their reply, say that, at the date of the resolution, Judah was secretary of the board of trustees, and falsely entered the resolution on the records of the board of trustees; that the resolution which was actually adopted provided, that for *all* his legal services and outlays (there were numerous other suits conducted by Judah as attorney for the University, and services and expenditures as agent) he should be allowed one-fourth, etc. But that Judah fraudulently, and without the knowledge or assent of the board, entered the resolution in form as stated in the answer.

Now, this reply is simply a denial of so much of the answer as alleges the adoption of the resolution, or, in other words, the making of the contract by the trustees. It is argumentative to be sure, and it needlessly explains how a resolution never made by the trustees comes to be found on their records. This is surplusage. But neither argumentativeness nor surplusage justifies a demurrer under our system of pleading. There was therefore no error in overruling the appellant's demurrer to the second paragraph of the reply.<sup>1</sup> . . .

BACH, CORY, AND COMPANY, LIMITED *v.* MONTANA  
LUMBER AND PRODUCE COMPANY *et al.*

SUPREME COURT OF MONTANA. 1895.

[Reported 15 *Montana*, 345.]

DE WITT, J. This is an appeal from a judgment rendered on the pleadings. The action was in replevin. Upon complaint and answer filed the plaintiff moved for judgment on the pleadings upon the following grounds:

"1. That there is no denial in defendants' answer of the allegations in plaintiff's complaint that the defendants took and received the lumber in said complaint described.

"2. That defendants' answer admits that the value of the lumber taken by defendants as alleged in plaintiff's complaint was \$618, and plaintiff should have judgment for such amount with legal interest thereon from the date of conversion.

"ELBERT D. WEED,

"Atty. for Plaintiff."

<sup>1</sup> A part of the opinion is omitted. The judgment was reversed on the ground of an erroneous ruling as to the right to open and close at the trial. — Ed.

This motion was granted. It is true that there was no denial in the answer that defendants took and received the lumber which was the subject of the action. The denial of the defendants is, that they did not take *and* carry away the lumber, etc. The denial is in the conjunctive. A denial that defendants took *and* carried away the goods is not a denial that they took the goods, or a denial that they carried them away. Boone on Code Pleading, § 61, and cases cited; *Harris v. Shontz*, 1 Mont. 212; *Toombs v. Hornbuckle*, 1 Mont. 286; *Power v. Gum*, 6 Mont. 5.

But there is a denial in the answer of another material allegation of the complaint, which denial raises an issue. The complaint alleges that on a certain day the plaintiff was the owner and lawfully possessed of the lumber. "The right to the possession of personal property is essential in the plaintiff in an action for claim and delivery." *Laubenheimer v. McDermott*, 5 Mont. 517; see also *Cobbey on Replevin*, § 784.

This essential allegation was made, as we have seen, in the complaint. This essential allegation of the complaint was denied in the answer in the following language: "The defendants deny that the plaintiff was, at the time mentioned, or at any other time, the owner or lawfully possessed of any lumber of the description given in the complaint, or of the value named therein, or of any other value, at the mill-yard of Coffey and Brennan, in the county and state aforesaid." Here the denial is in the disjunctive, which is proper. (See cases last cited.)

It is denied that the plaintiff was the owner *or* lawfully possessed of the lumber. This denial raised the material issue as to plaintiff's right of possession. There being an issue raised, judgment on the pleadings was error, and the same is therefore reversed.

*Reversed.*<sup>1</sup>

PEMBERTON, C. J., and HUNT, J., concur.

<sup>1</sup> Compare *Goram v. Sweeting*, 2 Saund. 205; *Stephen*, Pleading, Will. ed., \* 278; *Tildesley v. Harper*, 7 Ch. Div. 403, 10 Ch. Div. 393 (allegation that defendant offered plaintiff a bribe of 500 l.; denial that defendant offered plaintiff a bribe of 500 l.); *Feldman v. Shea*, 6 Ida. 717.

Where the denial is in the conjunctive and puts the plaintiff to the proof of several matters, the denial is not too large if the several matters are all necessary elements in the plaintiff's case. *South v. Jones*, 1 Str. 245. — ED.

SPENCER *v.* TURNEY & CO.

SUPREME COURT OF OKLAHOMA. 1897.

[Reported 5 *Oklahoma*, 683.]

BIERER, J. J. Turney & Co., brought this action in the court below to recover judgment for the principal and interest upon a note which they allege in their petition was made by defendant to plaintiffs at Fairfield, Iowa, on the 7th day of March, 1889, for the sum of \$1,363.50, with interest at the rate of 10 per cent per annum, said note being due six months after its date.

The defendant filed a demurrer to the petition, which was overruled, and he then answered in three paragraphs, the first being that the note was barred by limitation and the second and third being as follows:

"*Second:* That said defendant did not execute and deliver at Fairfield, Iowa, to the plaintiffs, or either of them, the note on which action has been brought and which is set up and described in plaintiffs' petition.

"*Third:* The defendant denies that he is indebted to plaintiffs in any sum whatever."

This answer was verified by the defendant.

Plaintiffs moved for judgment on the pleadings, which was granted, and exceptions saved, and defendant contends that this action of the court was erroneous.

It is claimed that the second paragraph of defendant's answer was sufficient to put in issue the execution of the note, and the cases of *Brenner v. Bigelow*, 8 Kan., 496, and *Moore v. Emmert*, 21 Kan. 1, are cited as authority in support of this position. The cases referred to in no way support this claim. The answer is a negative pregnant, which, in effect, admitted that the note was executed as alleged in the petition, but denied its execution and delivery at Fairfield, Iowa. To deny that the note was made at Fairfield, Iowa, implies that it was made at some other place. All that this paragraph of the answer denied was the place of the execution of the note and as the place where the note was made is, in this case, entirely immaterial, nothing that the plaintiff alleged was denied and the pleading tendered no issue. (Bliss on Code Pleading, § 332.)

In *Tate v. People*, [Col.], 40 Pac. 471, it was held:

"A denial in an answer that a judgment was assigned for a valuable consideration is a negative pregnant, which admits the assignment but denies the sufficiency of the consideration."

And in *Edgerton v. Power*, [Mont.], 45 Pac. 204, it was stated that:

“An answer which denies that ‘the amount of stock’ sold by plaintiff to defendant was ever delivered is defective, because a negative pregnant.”

The third paragraph of the answer which denied that the defendant was indebted to the plaintiffs in any sum whatever, also presented no issue. Plaintiffs did not allege an indebtedness, which would have been a conclusion, but they did allege the execution and delivery of a promissory note, which was an allegation of fact, and the defendant failed to deny this fact by attempting to deny a conclusion which plaintiffs had not alleged.

No other question is presented by brief of counsel. The trial court ruled correctly in sustaining the motion for judgment on the pleadings, and the judgment is accordingly affirmed.

All the justices concurring.

*Affirmed.*<sup>1</sup>

## MYN *v.* COLE.

KING'S BENCH. 1606.

[Reported *Croke, James*, 87.]

TRESPASS, for entering his house, and taking his goods.

The defendant pleads, as to the goods, not guilty; as to the entry into the house, that the plaintiff's daughter licenced him, &c. and that he entered by that licence.

The plaintiff saith, “*quod non intravit per licentiam suam*”: and issue was joined thereupon.

The first issue was found for the defendant; and the second issue for the plaintiff, that he did not enter by licence; and damages were assessed to eighty pounds. Whereupon it was moved in arrest of judgment, that he ought to have traversed the licence, and not the entry by the licence; for that is *pregnant* in itself, and an ill issue: and he ought to have traversed the entry by itself, or the licence by itself, and not both together.

<sup>1</sup> If one party makes a qualified allegation, and the other interposes a denial of the allegation “in manner and form as alleged,” the denial has been held to deny only the qualification. *Rumbough v. Improvement Co.*, 106 N. C. 461, 11 S. E. 528; *Storey v. Kerr*, 2 Neb. (Unof.), 568, 89 N. W. 601. For the effect at common law of a denial *modo et forma*, see Gould, Pleading, 2d ed., p. 316; Stephen, Pleading, Will. ed., \*219. — Ed.



WILLIAMS and YELVERTON were of that opinion. Vide 10 Edw. 4. 14 Hen. 4, pl. 32.

POPHAM agreed that the issue was ill, if it had been at the common law; but being tried, it is made good by the statute of 32 Hen. 8, c. 30, which aids mis-joining of issues; for an issue upon a *negative pregnant* is an issue: *per quod adjournatur*.<sup>1</sup>

HARDEN *v.* ATCHISON AND NEBRASKA R. R. CO.

SUPREME COURT OF NEBRASKA. 1876.

[Reported 4 *Nebraska*, 521.]

MAXWELL, J. The plaintiff filed his petition in the district court of Richardson county, alleging "that on the twenty-first day of July, 1873, a mare belonging to plaintiff, was on the railroad track of the defendant, in Falls City precinct, Richardson county, when a certain train of cars belonging to the defendant, and managed and controlled by its agents and employes, was passing over the railroad track. That the said agents and employes of said railroad, negligently, carelessly, and wantonly, ran its engine and train of cars upon, over and against said mare, breaking one of her legs and causing other injuries, to the damage of the plaintiff in the sum of \$75.00," etc. It was also alleged in the petition, that the railroad was not fenced, and that it had been constructed more than six months, at the time the injury was committed.

The defendant answered the petition of plaintiff as follows: "The defendant, answering the petition of said plaintiff, heretofore filed against it in the above entitled cause, says and denies that it negligently, carelessly, and wantonly ran its engine or locomotive and train of cars over or against the said mare of the said plaintiff. Defendant denies that the notice required by the statute, in such cases made and provided, was given it by said plaintiff, as to entitle said plaintiff to double damages. Defendant denies that said mare was worth the sum of seventy-five dollars. Defendant alleges that said mare of said plaintiff was injured in the manner alleged by said plaintiff's petition by and through the negligence and carelessness of the said plaintiff."

On the trial of the cause, the court instructed the jury as follows: "This suit is brought by the plaintiff to recover damages of

<sup>1</sup> *Aubery v. James*, 1 Vent. 70; s.c. 1 Sid. 444, 2 Keb. 623, *accord.* — Ed.

defendant, alleged to be sustained by plaintiff, by reason of the defendant negligently, carelessly, and wantonly, running its engine upon and so badly injuring his mare as to render it worthless. The defendant denies that its engine or locomotive and train of cars ran over or against the mare of the plaintiff. This denial, puts the plaintiff upon proof of his cause of action; has he proved the injury was done by the defendant, or any of its employees? I must instruct you as a matter of law, that the plaintiff has failed to prove that the defendant committed the injury, and your verdict must be for the defendant." To this instruction the plaintiff excepted. The jury found a verdict for the defendant. The plaintiff filed a motion for a new trial, which was overruled, and judgment was rendered dismissing the case. The case is brought into this court by petition in error.

*Sec. 134*, of the code of civil procedure, provides, that "every material allegation of the petition, not controverted by the answer, and every material allegation of new matter in the answer, not controverted by the reply, shall for the purposes of the action be taken as true."

Without considering the admissions contained in the answer, is there any denial therein, that the injury complained of was committed by the defendant? We think not. It is denied that the "defendant negligently, carelessly, and wantonly ran its engine, or locomotive and train of cars over, or against the said mare of the said plaintiff," but this is a mere denial of negligence on the part of the defendant, and not a denial that the defendant occasioned the injury complained of. "A defendant must answer the charges directly, without evasion, and not by way of negative pregnant." 1 Vansantvoords, Eq., 204. Moaks Van Sant, Pl., 814. Baker *v.* Bailey, 16 Barb., 56. Fish *v.* Redington, 31 Cal., 194. Robins *v.* Lincoln, 12 Wis., 8. A denial must be direct and unambiguous, and must answer the substance of each direct charge; and such facts as are not denied by the answer for the purposes of the action, are to be taken as true. This requirement of the statute is not designed to prevent the defendant from denying such facts in the petition, as he believes to be untrue, but to prevent the introduction of fictitious issues; and while denials must be positive and direct, the verification need only be, that the defendant believes the facts stated in the answer to be true.

There being no denial in the answer that the defendant committed the injuries complained of, no proof of those facts was required.

The court therefore erred in instructing the jury to find for the defendant. The judgment of the district court is reversed, and the case remanded for further proceedings.

*Reversed and remanded.*<sup>1</sup>

LAKE, CH. J., concurred.

EDSON *v.* DILLAYE and Others.

SUPREME COURT OF NEW YORK. 1853.

[Reported 8 *Howard's Practice Reports*, 273.]

THE complaint and answer were both verified in the usual form. A motion is made on the part of the plaintiff for an order to strike out all of the defendants' answer, except that part which admits the execution of the note, as false and frivolous, or for such other order as to the court shall seem meet, with costs. The other facts are sufficiently noticed in the opinion of the court.

WELLES, J. I am satisfied that the answer in this case, excepting that part of it which admits the making of the note, is entirely frivolous. Section 152 of the Code provides that sham and irrelevant answers and defences may be stricken out on motion. By section 247, if a demurrer, answer or reply be frivolous, the party prejudiced thereby may apply to a judge of the court, either in or out of court, for judgment thereon, and judgment may be given accordingly. Section 149 declares that the answer of the defendant must contain, 1st. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof, sufficient to form a belief. 2d. A statement of any new matter constituting a defence or counter claim, in ordinary and concise language, without repetition.

It is not pretended that the answer in this case falls under the second sub-division. It certainly contains no new matter. It is contended that it does contain specific denials of material allegations of the complaint. They are, first, a denial of the allegation of non-payment of the note contained in the complaint; second, a denial of indebtedness by reason of making the note, or that the

<sup>1</sup> Wall *v.* Buffalo Water Works Co., 18 N. Y. 419, *contra*.

An answer like that in the principal case is a negative pregnant and open to a motion to make more definite and certain, but the objection is waived by failure to make such a motion. See Wall *v.* Buffalo Water Works Co., *supra*. — Ed.

note or any part of it is justly due or owing by the defendants to the plaintiff. Under these denials, no new matter would be admissible in evidence. The plaintiff would have nothing to prove upon the trial, except it might be a computation of the interest upon the note; for the making of the note is admitted by the answer. He would only have to open his case to the jury and demand their verdict; and there is nothing that the defendants could give in evidence under their answer. That they could not prove payment, because they have not set it up in their answer; and so, of any other imaginable defence. Having admitted the making of the note, and not having set up any fact showing why they ought not to pay it, their liability to pay it is a legal conclusion, from which the defendants cannot escape, as they have not prepared the way by their answer, for giving any defence in evidence.

The defendants' counsel have requested permission to amend. Amendments are usually allowed in order to promote the ends of justice. In the present case there is no affidavit showing that the defence was interposed in good faith; and the moving affidavits show a state of facts entirely inconsistent with any defence whatever; and these affidavits are not met, or attempted to be met, with any denial or explanation. I do not understand the practice to be to allow of relieving a defendant from such a predicament, into which he has voluntarily brought himself.

The motion is granted, with ten dollars costs, and judgment is ordered for the plaintiff for the amount of the note, to be assessed upon regular notice by the clerk of Monroe county, which county is designated in the complaint as the place of trial.<sup>1</sup>

## SNOW *v.* CHATFIELD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1858.

[Reported 11 *Gray*, 12.]

**ACTION OF TORT.** The declaration alleged that the defendant "wrongfully, wilfully and without right" dug and excavated a sluice way and ditch along the line of a highway in West Stockbridge, and near the plaintiff's dwelling-house, and thereby injured the house. The answer denied "each and every allegation contained in the plaintiff's declaration."

<sup>1</sup> See *Columbia Nat. Bank v. Western Iron & Steel Co.*, 14 Wash. 162, 44 Pac. 145. — Ed.



At the trial in the court of common pleas, the defendant offered to show that the sluice way and ditch were excavated with the consent and approbation of the surveyor of highways. Mellen, C. J. admitted the evidence for the purpose of rebutting any inference of the wilfulness of the act complained of; but refused to admit it for the purpose of establishing a legal justification, on the ground that no such defence was set up in the answer. The verdict was for the plaintiff, and the defendant alleged exceptions.

DEWEY, J. The evidence offered by the defendant was to prove a substantive fact intended to be relied on by the defendant in avoidance of the action, and should therefore, under the provisions of St. 1852, c. 312, § 18, have been set forth in precise terms in the answer. It is no excuse for not doing this that the declaration alleges that "the defendant wrongfully, wilfully and without right" dug and excavated a sluice way or ditch along the line of the highway and near the dwelling-house of the plaintiff, thereby injuring the plaintiff's dwelling-house. Such form of declaring does not require the plaintiff to prove as a part of his case in the first instance that the same was not done by a surveyor of highways, acting under the written approbation of the selectmen of the town. The proof of the acts set forth in the declaration, and the alleged injury to the plaintiff thereby, would require of the defendant to justify, if he would maintain his defence. Such justification or substantive defence should be stated in his answer. He not having done so, but merely filed a general denial of "each and every allegation contained in the plaintiff's declaration," has no right upon these pleadings to justify his acts under any authority derived from a surveyor of highways. *Exceptions overruled.*

THE ORIENT INSURANCE COMPANY OF HART-  
FORD, CONN. *v.* NORTHERN PACIFIC RAILWAY  
COMPANY.

SUPREME COURT OF MONTANA. 1905.

[Reported 31 *Montana*, 502.]

ACTION by the Orient Insurance Company of Hartford, Connecticut, against the Northern Pacific Railway Company, to recover insurance paid to owners of wool stored in a warehouse ignited by sparks from defendant's engines and burned. Judgment for plaintiff. Defendant appealed. Affirmed.

CLAYBERG, C.<sup>1</sup> Appeal by the Northern Pacific Railway Company from a judgment and order overruling its motion for a new trial.<sup>2</sup> . . .

Under the decisions of this court, contributory negligence on the part of plaintiff is a defense which, in order to be relied on, must be pleaded by defendant, in cases of this character. *Ball v. Gushenhoven*, 29 Mont. 321, 74 Pac. 871; *Cummings v. Helena & Livingston S. & R. Co.*, 26 Mont. 434, 68 Pac. 852, and cases cited. The existence of contributory negligence need not be negatived in the complaint unless it appears from other allegations therein that the proximate cause of the injury was the act of the plaintiff. Upon the other allegations of this complaint, it is very apparent that the proximate cause of the injury in this case, for which suit was brought, was not the act of plaintiff, or of any of its predecessors or its assignees, but that of defendant. We find no allegations of such defense in the answer. True, the allegation is found in the complaint that the wool was destroyed by negligence of defendant, "and wholly by reason thereof, and without any fault on the part of said firm of Hunter & Anderson, or of any member thereof, or plaintiff." This allegation was denied generally in the answer. This is not sufficient to raise the issue of the contributory negligence of the plaintiff or its assignors. Plaintiff was not required, as above stated, to allege want of contributory negligence, and therefore its allegations above quoted are mere surplusage, and need not be proved. Defendant cannot be heard to assert that it is excused from pleading the defense of contributory negligence because of this allegation in the complaint. . . .

*Per Curiam.* For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

CANFIELD *et al.* *v.* TOBIAS *et al.*

SUPREME COURT OF CALIFORNIA. 1863.

[Reported 21 *California*, 349.]

COPE, J., delivered the opinion of the Court — FIELD, C. J., and NORTON, J., concurring.

This is an action to recover a balance alleged to be due on an account for goods, wares, and merchandise. The plaintiff obtained

<sup>1</sup> A part of the opinion is omitted. — ED.

<sup>2</sup> The court withdrew from the jury the consideration of contributory negligence. — ED.

a judgment upon the pleadings, and the only question is as to the sufficiency of the answer.

The answer admits that the indebtedness once existed, but avers that certain promissory notes, signed by the defendants and indorsed by a third person, were received by the plaintiffs in satisfaction of the debt. It contains a copy of a receipt purporting to have been signed by the plaintiffs, acknowledging that the notes were received in full payment of the amount due, and avers that the notes themselves have been paid. For the purposes of the case, the matters set forth in the answer are to be taken as true, and there is no doubt that these matters, relieved of other considerations, constitute a defense to the action. It is claimed, however, that the answer fails to deny, or denies insufficiently, certain allegations of the complaint charging the defendants with fraud and misrepresentation in procuring the assent of the plaintiffs to the arrangement referred to. The character of the arrangement is fully set forth in the complaint, and the allegations upon the subject were inserted by way of anticipation, and not as a part of the cause of action necessary to be stated in the first instance. They are not, therefore, such allegations as were required in the complaint, and treating the denials in the answer as insufficient to raise an issue upon them, the question occurs as to whether they are to be acted upon as admitted. The statute provides that every material allegation in the complaint, not specifically controverted by the answer, shall be taken as true; and a material allegation is defined to be one which is essential to the claim, and cannot be stricken from the pleading without leaving it insufficient. *Prac. Act*, secs. 65, 66. It would seem from this that an allegation which is not essential to the claim, and which, therefore, is an immaterial one, is not an allegation necessary to be controverted by the answer, in order to avoid the consequence attached to a failure in this respect as to a material allegation. The language used is equivalent to saying, that unless the allegation is essential to the sufficiency of the pleading this consequence is not to follow, for *expressio unius est exclusio alterius* is the rule in such cases. The only allegations essential to a complaint are those required in stating the cause of action, and allegations inserted for the purpose of intercepting and cutting off a defense are superfluous and immaterial. The matter alleged may be material in the case, but immaterial in the complaint, and a plaintiff cannot by pleading such matter at the outset call upon the defendant to answer it. He must plead it at the proper time and in pursuance of the rules

regulating the course of proceeding, and he cannot anticipate the defense to be made and reply to it in advance. The object of such pleading is to put the adverse party upon his oath without making him a witness, and the effect of allowing it would be to establish a system of discovery in conflict with the spirit of the statute. We are of opinion, therefore, that the allegations in question are not such as the defendants were called upon to answer, and that no inference of their truth is to be drawn from a failure to deny them.

*Judgment reversed and cause remanded.*

STATUTE 4 ANNE, CHAPTER XVI, SECTIONS 4 AND 5 (1705).

[11 *Statutes at Large*, 156.]

AND be it further enacted by the authority aforesaid, That from and after the said first day of Trinity term [1706] it shall and may be lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin, in any court of record, with the leave of the same court, to plead as many several matters thereto, as he shall think necessary for his defence.

Provided, nevertheless, That if any such matter shall upon a demurrer joyned, be judged insufficient, costs shall be given at the discretion of the court; or if a verdict shall be found upon any issue in the said cause for the plaintiff or demandant, costs shall be also given in like manner, unless the judge who tried the said issue, shall certify, that the said defendant, or tenant, or plaintiff in replevin, had a probable cause to plead such matter which upon the said issue shall be found against him.

#### NEW YORK CODE OF CIVIL PROCEDURE.

SEC. 507. A defendant may set forth, in his answer, as many defenses or counterclaims, or both, as he has, whether they are such as were formerly denominated legal or equitable. Each defense or counterclaim must be separately stated, and numbered. Unless it is interposed as an answer to the entire complaint, it must distinctly refer to the cause of action which it is intended to answer.



SHALLCROSS *v.* WEST JERSEY AND SEASHORE  
RAILROAD COMPANY *et al.*

SUPREME COURT OF NEW JERSEY. 1907.

[Reported 75 *New Jersey Law*, 395.]

SWAYZE, J.<sup>1</sup> Four corporations were made defendants in this suit. At the trial the plaintiff suffered a voluntary nonsuit as to the Philadelphia and Camden Ferry Company, and a verdict was rendered against the West Jersey and Seashore Railroad Company, the Pennsylvania Railroad Company and the United New Jersey Railroad and Canal Company. We fail to find any evidence connecting the last-named company with the injury of which the plaintiff complains, and the only ground on which the motion to nonsuit as to that company was resisted was its plea of justification. But this plea was accompanied by a plea of not guilty. Although these pleas are inconsistent, it is permissible to file inconsistent pleas since the statute of 4 Anne, which appears in a modified form in our Practice act as section 116. Pamph. L. 1903, p. 570; *Parks v. McClellan*, 15 Vroom 552. Tidd cites a case where in trespass the defendant pleaded not guilty and several pleas in justification. 1 Tidd 659.

Manifestly the permissibility of such inconsistent pleas prevents the plea of justification from being evidence in the plaintiff's favor on the plea of not guilty, even if pleadings are to be treated as admissions of the parties, which may well be doubted. Greenl. Ev. (Wigm. ed.), § 186.

The effect of a bill of particulars (*Lee v. Heath*, 32 Vroom 250) rests on a different ground. It is an admission of a party, and not a mere pleading by an attorney.<sup>2</sup> . . .

STEENERSON *v.* WATERBURY *et al.*

SUPREME COURT OF MINNESOTA. 1893.

[Reported 52 *Minnesota*, 211.]

COLLINS, J.<sup>3</sup> . . . There was a general denial in the answer by which the allegations of the complaint as to the rendition of the services, and that they were performed at defendants' request, were

<sup>1</sup> A part of the opinion is omitted. — Ed.

<sup>2</sup> See *Wheeler v. Robb*, 1 Black. (Ind.), 330, 12 Am. Dec. 245; *Troy & Rutland R. R. Co. v. Kerb*, 17 Barb. (N. Y.), 581; *De Waltoff v. Third Ave. R. R. Co.*, 75 N. Y. App. Div. 351, 78 N. Y. Supp. 132. — Ed.

<sup>3</sup> Only a part of the opinion is given. There was a verdict for the plaintiff

put in issue, and this denial was followed by a special averment that prior to the commencement of the action defendants had paid plaintiff in full of all demands, including that set forth in the complaint. The position of plaintiff was, and is, that, because of an inconsistency between the general denial and the special plea of payment, the latter controlled, and it stood admitted on the trial that the professional services were rendered at defendants' request. Under our system of pleading, a defendant may set up as many defenses as he may have; the only limit to this right being that they must not be inconsistent. Separate and distinct defenses are consistent when both may be true, and are only held inconsistent when the proof of one necessarily disproves the other. These allegations did not stand opposed to the extent that, if one should be established by testimony, the other would of necessity be proven untrue; for the fact might be that plaintiff's services had been rendered without defendants' request, and yet have been considered and taken into account in a subsequent settlement, at which they paid plaintiff in full of all demands. There exists no good reason why one should not be permitted to settle a claim for services which he regards as unjust, because no services have been required, without having his act construed to his prejudice. . . .

*Order affirmed.*<sup>1</sup>

[Stephen, *Pleading*, Williston's edition, \*50-\*57.]

PLEAS are divided into pleas dilatory and peremptory; and this is the most general division to which they are subject.

Subordinate to this is another division. Pleas are either to the jurisdiction of the Court — in suspension of the action — in abatement of the writ or declaration — or, in bar of the action; the three first of which belong to the dilatory class, the last is of the peremptory kind.

A plea to the jurisdiction is one by which the defendant excepts to the jurisdiction of the Court to entertain the action. . . .

A plea in suspension of the action is one which shows some ground for not proceeding in the suit at the present period, and prays that the pleading may be stayed until that ground be removed. The number of these pleas is small, and none of them is of ordinary occurrence in practice.

and the trial court granted a new trial on the ground that the verdict was not sufficiently supported by the evidence. — ED.

<sup>1</sup> See Pomeroy, *Code Remedies*, 4th ed., pp. 830 *et seq.* — ED.

A plea in abatement is one which shows some ground for abating or quashing the original writ in a real or mixed action, or the declaration in a personal action, and makes prayer to that effect.

The grounds for such plea are any matters of fact tending to impeach the correctness of the writ or declaration; *i. e.*, to show that they are improperly framed, without, at the same time, tending to deny the right of action itself.

Besides these pleas in abatement, properly so called, there are others which take exception to the personal competency of the parties to sue or to be sued; these are not founded on any objection to the writ or declaration, and therefore do not fall within the definition which has been given of pleas in abatement; but as they offer like them a sort of formal objection, and do not tend to deny the right of action itself, they are considered as of the same general nature with that class of pleas, and pass under the same denomination. . . .

The effect of all pleas in abatement, if successful, is, that the particular action is defeated. But, on the other hand, the right of suit itself is not gone; and the plaintiff, on resorting to a better form of writ or declaration, may maintain a new action, if the objection were founded on the frame or tenor of those instruments; or if the objection were to the ability of the party (as in the last of the above examples), a new action may be brought when that disability is removed.

[*Form of Plea in Abatement.*] <sup>1</sup>

In the Queen's Bench.

The — — day of ———, in the  
year of our Lord ———.

|            |   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
|------------|---|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| C. D.    } | { | The defendant, by — his attorney, [ <i>or</i> , in person], prays judgment of the said declaration, because he says that the said several supposed promises and undertakings in the said declaration mentioned (if any such were made), were made jointly with one G. H., who is still living, and at the commencement of this suit was and still is resident within the jurisdiction of this Court, to wit, at —, and not by the defendant alone. And this the defendant is ready to verify. Wherefore inasmuch as the said G. H. is not named in the said declaration, together with the said defendant, he, the said defendant, prays judgment of the said [writ and] declaration, and that the same may be quashed. |
| A. B.    } |   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |

<sup>1</sup> See Stephen, Pleading, Will. ed., \* 54. — Ed.

## HASTROP v. HASTINGS.

KING'S BENCH. 1692.

[Reported 1 *Salkeld*, 212.]

IN an action upon the case for beer and wages, the defendant pleaded in abatement, *et pet. judicium de billa, et quod billa prædict. cassetur*, for uncertainty in the declaration upon demurrer, the defendant's counsel insisted upon many faults in the declaration. *Et per Cur.* The defendant shall not take advantage of mistakes in the declaration upon a plea in abatement; but if he would do that, he must demur to the declaration, *per quod a respondeas ouster* was awarded.<sup>1</sup>

## SECTION III.

*Recoupment, Set-off and Counterclaim.*

STACY v. KEMP.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1867.

[Reported 97 *Massachusetts*, 166.]

CONTRACT upon a promissory note, the making of which the defendant admitted in his answer. . . .

It further appeared in evidence that the defendant was about to go into the business of peddling milk in Holyoke, and bought of one Cleveland, who held himself out as acting for the plaintiff, a lot of personal property and a milk route, agreeing to pay to the plaintiff six hundred dollars therefor, and did pay three hundred dollars in cash, and gave his note for the balance, which

<sup>1</sup> Advantage may be taken on general demurrer of defects of form in a plea in abatement. *Walden v. Holman*, 2 Ld. Raym. 1015.

JUDGMENT. At common law if the plaintiff demurs to a plea in abatement and the demurrer is overruled, the judgment is that the writ or declaration be quashed (*cassetur breve, or narratio*).

If the plaintiff traverses a plea in abatement and the verdict is given for the defendant, the judgment is the same.

If a demurrer to a plea in abatement is sustained, the judgment is that the defendant answer over (*respondeat ouster*).

If the plaintiff traverses a plea in abatement and the verdict is given for the plaintiff, the judgment is that the plaintiff recover. *Myers v. Erwin*, 20 Oh. 381; *Boright v. Williams*, 87 Vt. 245, 88 Atl. 735; Ames, Cases on Pleading. ed. of 1905, 28. — Ed.



is the note in suit; and that, at the time of paying the money and giving the note, the plaintiff gave to him a writing in the following words: "Holyoke, June 23, 1866. Sold this day to S. B. Kemp one milk route and fixtures, consisting of one buckskin colored horse, one covered milk cart, one open milk sleigh, two harnesses, two buffalo robes, one horse-blanket, one halter, one surcingle, thirty milk cans more or less, one rack for hanging cans, for the sum of six hundred dollars. Received payment, (Signed) N. W. Stacy."

The defendant then offered to prove that Cleveland was the real owner of the property sold and of the note in suit; that the use of the plaintiff's name in the transaction was to guard it against Cleveland's creditors; and that, at the time the bargain was made, and as part of the same, and for the same consideration of six hundred dollars, Cleveland agreed orally, with the consent and knowledge of the plaintiff, not to peddle milk in Holyoke while the defendant should continue in that business there; but that, in violation of this agreement, Cleveland had continued to peddle milk over the same route, greatly injuring the defendant's business thereby; but the judge ruled that evidence of this agreement was inadmissible. The defendant then offered to prove that, by the plaintiff's act through Cleveland, the milk route described in the writing executed by the plaintiff had been rendered valueless to him, and that Cleveland, by the authority of the plaintiff, influenced the customers on the route not to buy milk of the defendant, but of himself; but the judge ruled that such evidence was incompetent.

A verdict was found for the plaintiff; and the defendant alleged exceptions.

CHAPMAN, J.<sup>1</sup> . . . It was competent to the defendant to prove that the note was given as well in consideration of a sale of the good will of the milk route, and an agreement not to go into the business which should interfere with it, as of a sale of the articles enumerated in the bill of parcels. Agreements of this character are valid, and are often specifically enforced in equity by injunction, and at law by actions for damages. Evidence that the plaintiff has interfered with the route in the manner stated, would tend to show that he has deprived the defendant of a part of the consideration for which the note is given. It was formerly held that such damages must be recovered by a cross action, and could not be proved and allowed

<sup>1</sup> A part of the statement of facts and a part of the opinion are omitted. —  
Ed.

in defence of an action on the note, by way of *recoupment*. But the doctrine of *recoupment* of damages was fully established in this court, in *Harrington v. Stratton*, 22 Pick. 510. See *Burnett v. Smith*, 4 Gray, 50. It has since been applied in numerous cases, and was already well established in New York. It is an equitable set-off of damages which ought to be deducted from the plaintiff's demand, and for the recovery of which the defendant ought not to be turned round to a cross action. The court are of opinion that it should be applied to a case like the present, where the plaintiff has deprived the defendant of a valuable part of the consideration of the note in suit, if the facts which were alleged shall be proved.<sup>1</sup>

STATUTE 2 GEORGE II, CHAPTER 22, SECTION 13 (1729).

[16 *Statutes at Large*, 53.]

AND be it further enacted by the authority aforesaid, that where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require, so as at the time of his pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matters shall not be allowed in evidence upon such general issue.<sup>2</sup>

<sup>1</sup> See *Basten v. Butter*, 7 East, 479; *Street v. Blay*, 2 Barn. & Ald. 456; *Brunson v. Martin*, 17 Ark. 270; *Stow v. Yarwood*, 14 Ill. 424; *Streeter v. Streeter*, 43 Ill. 155; *Reab v. McAlister*, 8 Wend. (N. Y.), 109; *Batterman v. Pierce*, 3 Hill (N. Y.), 171; *Waterman*, Set-off, Recoupment and Counter-claim, chap. X.

As to the extent of the right to recoup, see *Edge Moor Iron Co. v. Brown, etc., Co.*, 6 Pennew. (Del.), 10, 62 Atl. 1054; *Sutherland*, Damages, 4th ed., sec. 168 *et seq.*

Recoupment is purely defensive. *Ward v. Fellers*, 3 Mich. 281; *Sickels v. Pattison*, 14 Wend. (N. Y.), 257; *Sutherland*, Damages, 4th ed., sec. 186; 34 Cyc. 760; 19 Encyc. of Pl. and Pr. 810. But see *Johnson v. White Mountain Creamery Ass'n*, 68 N. H. 437, 36 Atl. 13, 73 Am. St. Rep. 610.

As to the right of a defendant to bring a cross action, see Chapter XIII, *infra*. — Ed.

<sup>2</sup> By its terms this act was to continue in force for five years. The provision as to set-off was amended and made perpetual by Stat. 8 Geo. II, c. 24. — Ed.

In *STOOKE v. TAYLOR*, 5 Q. B. D. 569, p. 575, the court, Cockburn, C. J., said:

By the statutes of set-off this plea is available only where the claims on both sides are in respect of liquidated debts, or money demands which can be readily and without difficulty ascertained. The plea can only be used in the way of defence to the plaintiff's action, as a shield, not as a sword. Though the defendant succeeded in proving a debt exceeding the plaintiff's demand, he was not entitled to recover the excess; the effect was only to defeat the plaintiff's action, the same as though the debt proved had been equal to the amount of the claim established by the plaintiff and no more.<sup>1</sup>

### FREEMAN *v.* HYETT.

KING'S BENCH. 1762.

[Reported 1 *William Blackstone*, 394.]

ACTION for money due for a parcel of cloth. Dunning moved to stay the trial of the cause, in order to send a commission into Portugal to establish a fact by way of set-off; *viz.* That in a former parcel of cloths sent to Portugal, and bought of the same plaintiff, it appeared, on opening the bale, that they were burnt in the pressing, which had greatly lowered their value.

*Norton*, Solicitor-General, objected, that the set-off was not maintainable. You might as well set off the damages which you are entitled to recover for a battery: you should bring your special action on the case.

And of that opinion was the Court, and denied the motion.<sup>2</sup>

<sup>1</sup> But in the United States, statutes generally allow a defendant in set-off to recover an excess over the plaintiff's cause of action. *Truesdell v. Wallis*, 4 Pick. (Mass.), 63; 34 Cyc. 760; 19 Encyc. of Pl. and Pr. 808. — Ed.

<sup>2</sup> See also *Grant v. Royal Exchange Ass. Co.*, 5 M. & S. 439; *Taylor-Stites Glass Co. v. Manufacturers' Bottle Co.*, 201 Mass. 123, 87 N. E. 558; *Godkin v. Bailey*, 74 N. J. L. 655, 65 Atl. 1032, 9 L. R. A. (N. S.), 1134; 34 Cyc. 696. — Ed.

## WALKER v. CLEMENTS.

QUEEN'S BENCH. 1850.

[Reported 15 *Queen's Bench*, 1046.]

ASSUMPSIT. The declaration (which recited a writ issued 31st October, 1849) was for work and labour as an attorney, money paid, and on an account stated.

Plea (dated 30th November, 1849), among others: That "plaintiff, before and at the time of the commencement of this suit, was, and from thence hitherto hath been and still is, indebted" to defendant in &c. (on a promissory note and two bills of exchange, and for railway shares and certificates of ownership of shares in companies, scrip certificates, goods and chattels, sold transferred and delivered, money lent, money paid, money had and received, interest, and money due on divers accounts stated): which sums exceeded &c.; and defendant offered to set-off &c. (in the common form).

Replication (dated 8th December, 1849): That the said supposed debts and causes of set-off "did not, nor did any part thereof, arise or accrue at any time within six years next before the commencement of this suit or the pleading of the said plea." Verification.

Special demurrer, assigning causes which, so far as regards the decision of the Court, will sufficiently appear from the argument.

LORD CAMPBELL, C. J. I think the plea bad. The set-off is substituted for a cross action. When are we to suppose that cross action brought? Clearly at the time of the commencement of the plaintiff's action, since a set-off not then existing cannot be insisted upon.

COLERIDGE, J. I am of the same opinion. A set-off must be available as a cross action would be.

WIGHTMAN and ERLE Js. concurred. *Judgment for defendant.*<sup>1</sup>

<sup>1</sup> Compare Mass. R. L. Chap. 174, sec. 10. — Ed.



## NEW YORK CODE OF CIVIL PROCEDURE.

SEC. 501. The counterclaim, specified in the last section, must tend, in some way, to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action:

1. A cause of action, arising out of the contract or transaction, set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action on contract, any other cause of action on contract, existing at the commencement of the action.

SEC. 495. The plaintiff may also demur to a counterclaim, upon which the defendant demands an affirmative judgment, where one or more of the following objections thereto, appear on the face of the counterclaim:

1. That the court has not jurisdiction of the subject thereof.

2. That the defendant has not legal capacity to recover upon the same.

3. That there is another action pending between the same parties, for the same cause.

4. That the counterclaim is not of the character specified in section five hundred and one of this act.

5. That the counterclaim does not state facts sufficient to constitute a cause of action.

SEC. 503. When a counterclaim is established, which equals the plaintiff's demand, the judgment must be in favor of the defendant. Where it is less than the plaintiff's demand, the plaintiff must have judgment for the residue only. Where it exceeds the plaintiff's demand, the defendant must have judgment for the excess, or so much thereof as is due from the plaintiff. . . .

SEC. 509. Where the defendant deems himself entitled to an affirmative judgment against the plaintiff, by reason of a counterclaim interposed by him, he must demand the judgment in his answer.

## WREGE v. JONES.

SUPREME COURT OF NORTH DAKOTA. 1904.

[Reported 13 *North Dakota*, 267.]

YOUNG, C. J.<sup>1</sup> This is an action for slander. The plaintiff recovered a verdict in the sum of \$500. The defendant has appealed from the order denying his motion for new trial, and also from the judgment.

The complaint alleges that on October 3, 1902, the defendant, in the village of Hankinson, in Richland county, in the presence of divers persons, four of whom are named, falsely and maliciously spoke and published of and concerning the plaintiff the following false, malicious, and defamatory words: " 'You stole my wheat ' (meaning thereby that this plaintiff stole wheat owned by defendant). ' Mr. Albert Wrege stole my wheat. I will have you both arrested ' (meaning thereby that the defendant would have this plaintiff and his brother arrested for the alleged offense)." The answer interposed by the defendant consisted of (1) a general denial; (2) mitigating circumstances; and (3) a counterclaim. The trial court held upon demurrer that the cause of action set up as a counterclaim did not arise out of the transaction which is the foundation of plaintiff's claim, and was not, therefore, allowable. The case was tried upon the remaining issues, with the result above stated.

The first error assigned is the ruling upon the demurrer. The answer alleged, by way of counterclaim, " that on said October 3, 1902, and at the same time and at the same place, and as a part of the same conversation and transaction mentioned and referred to in the complaint, and in the presence of the same persons who are named and mentioned therein, the said plaintiff falsely and maliciously spoke the following false, slanderous, and defamatory words of, about and concerning the plaintiff, to wit: ' Jones, you are a damned robber.' " Damages were prayed for in the sum of \$3000. Counsel for defendant urge that " the cause of action set up in the complaint and the cause of action contained in the counterclaim arose out of one and the same transaction," and that for this reason the counterclaim is within section 5274, subd. 1, Rev. Codes 1899, which authorizes one to plead as a counterclaim " a cause of action arising out of the contract or transaction set forth

<sup>1</sup> A part of the opinion holding that a new trial should be granted for erroneous exclusion of evidence is omitted. — ED.

in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action." We cannot agree that the transaction out of which defendant's cause of action arose is the "transaction set forth in the complaint as the foundation of the plaintiff's claim," and are therefore of opinion that the demurrer was properly sustained. The statute just referred to is common to a number of states. Thus far the courts have not arrived at a definition of the term "transaction," as used therein, which is wholly satisfactory. It is quite generally agreed, however, that it is broader in meaning than the word contract," and includes torts; otherwise it would not have been employed. Probably the definition given in Pomeroy on Code Remedies, section 774, is the most accurate and comprehensive, i. e., "that combination of acts and events, circumstances and defaults, which, viewed in one aspect, results in the plaintiff's right of action, and, viewed in another aspect, results in the defendant's right of action." The fact that two transactions originate at the same time and place, and between the same parties, is not the test. The question in such cases is, "Did each cause of action accrue or arise out of the same transaction — the same thing done?" *Anderson v. Hill*, 53 Barb. 239. It is clear in this case that they did not. The act set forth in the complaint as the foundation of plaintiff's claim, and which gave rise to his cause of action, was the speaking by defendant of the defamatory words charged in the complaint. The act which gave rise to the defendant's cause of action was the speaking by plaintiff of the defamatory words charged in the counterclaim. Each act was complete in itself — a separate tort — and constituted a transaction, within the meaning of the above section. It cannot be said that the utterance of the slanderous words by the defendant resulted in a cause of action in his favor for the plaintiff's tort. The latter arose from a wholly distinct act, namely plaintiff's utterance of the slanderous words. There was no single transaction, which, "viewed in one aspect," gave plaintiff's right of action, and, in another aspect, defendant's right of action. The transactions were separate. Our conclusion that one slander cannot be set up as a counterclaim against another slander is in harmony with the views of the courts of New York under the same statute. *Sheehan v. Pierce*, 70 Hun, 22, 23 N. Y. Supp. 1119; *Fellerman v. Dolan*, 7 Abb. Prac. 395.<sup>1</sup> . . .

<sup>1</sup> Compare *Atlas Metal Co. v. Miller*, [1898] 2 Q. B. 500; *Quinn v. Hession*, 4 L. R. (Ir.), 35; *Macdougall v. Maguire*, 35 Cal. 274; *Keller v. B. F. Goodrich*

## SECTION IV.

*Replies or Replications.*

## LOAN &amp; TRUST SAVINGS BANK v. STODDARD

*et al.*, Impleaded with HOLCOMB BROS. *et al.*

SUPREME COURT OF NEBRASKA. 1902.

[Reported 2 *Nebraska*, *Unofficial*, 486.]

THIS is an action to foreclose a mortgage, given as security for two notes. The defendants, Holcomb Bros., for answer to the petition alleged, *inter alia*, a want of consideration for the notes and mortgage. The plaintiff filed no reply. Upon the trial the court found that the plaintiff's mortgage was a first lien on the land described in the petition and awarded the plaintiff a decree of foreclosure. The defendants appealed.<sup>1</sup>

DAY, C. . . . It is now urged that, inasmuch as the plaintiff filed no reply, therefore the want of consideration for the notes and mortgage stands admitted on the record. Without discussing whether such a denial in the answer to the allegations of the petition presents new matter calling for a reply, it is sufficient in this case to say that upon the trial both parties treated the consideration as an issue in the case. The chief contention in the court below was over the want of consideration. It is now the settled rule of this court that where the parties to an action enter upon a trial and treat the allegations of new matter alleged in the answer as denied, this court will also treat them so, notwithstanding no reply appears in the record. *Schuster v. Carson*, 28 Neb., 612. In *Missouri P. R. Co. v. Palmer*, 55 Neb., 559, it is said: "Where, in the trial of a cause both parties treat an affirmative defense as traversed, it will be so considered in this court although the plaintiff filed no

Co., 117 Ind. 556, 19 N. E. 196; *Gutzman v. Clancy*, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744. See 34 Cyc. 706 *et seq.*

As to set-off and counterclaim against the state or a foreign sovereign, see *Strousberg v. Costa Rica Republic*, 29 W. R. 125; *South African Republic v. La Compagnie*, [1898] 1 Ch. 190; *State v. Arkansas Brick & Mfg. Co.*, 98 Ark. 125, 135 S. W. 843, 33 L. R. A. (n. s.), 376; *People v. Dennison*, 84 N. Y. 272.

As to the modern English set-off and counterclaim, see the *Annual Practice*, 1915, p. 377; *Halsbury, Laws of England*, Tit. "Set-off and Counterclaim"; *Odgers, Pleading*, 7th ed., 256 *et seq.* — Ed.

<sup>1</sup> The statement of facts is taken from the opinion of the court and is abridged. A part of the opinion is omitted. — Ed.



reply either before or after judgment." *Minzer v. Willman Mercantile Co.*, 59 Neb., 410. . . .

HASTINGS and KIRKPATRICK, CC., concur.

*Affirmed.*<sup>1</sup>

HOLCOMB, J., took no part in the decision.

#### NEW YORK CODE OF CIVIL PROCEDURE.

SEC. 522. Each material allegation of the complaint, not controverted by the answer, and each material allegation of new matter in the answer, not controverted by the reply, where a reply is required, must for the purposes of the action, be taken as true. But an allegation of new matter in the answer, to which a reply is not required, or of new matter in a reply, is to be deemed controverted by the adverse party, by traverse or avoidance, as the case requires.

SEC. 516. When an answer contains new matter, constituting a defence by way of avoidance, the court may in its discretion, on the defendant's application, direct the plaintiff to reply to the new matter.<sup>2</sup> . . .

#### POTTS *et al.* v. THE POINT PLEASANT LAND CO.

SUPREME COURT OF NEW JERSEY. 1885.

[Reported 47 *New Jersey Law*, 476.]

REED, J. The declaration is for breach of covenant. It sets out a contract under seal, by the terms of which the plaintiff was to perform for the defendants certain work in filling and grading certain lots and claying certain sidewalks at Point Pleasant. It then declares that the defendants did covenant, in consideration of the faithful performance of the said work, to pay eighteen cents per cubic yard for the sand or clay removed, the payment to be made by a deed of real estate, by an assignment of certain mortgages, by orders for guano and by the payment of cash.

<sup>1</sup> See *Ringle v. Bicknell*, 32 Ind. 369; *Louisville & Nashville R. R. Co. v. Copas*, 95 Ky. 460, 26 S. W. 179. Compare *Denver, etc., R. R. Co. v. Smock*, 23 Colo. 456, 46 Pac. 681; *Benicia Ag. Works v. Creighton*, 21 Ore. 495, 28 Pac. 775, 30 Pac. 676. — Ed.

<sup>2</sup> Compare Mass. R. L. chap. 173, sec. 31; *Comstock v. Livingston*, 210 Mass. 581, 97 N. E. 106.

For the modern English practice as to replies, see *Rules of the Supreme Court*, 1883, Order XXIII. — Ed.

It than avers the due performance of the work on the part of the plaintiffs, and the failure of the defendants to perform their covenant to make payment according to the terms of their contract.

To this declaration the defendants pleaded, among others, the plea that the performance of the work was a condition precedent to the plaintiffs' right to payment, and that the plaintiffs had not performed the said work.

To this plea the plaintiffs replied that although they tendered themselves ready and willing to complete the said work, the defendants notified them to remove from the defendants' land all the plaintiffs' material, tools and working implements, by reason of which they were prevented from continuing said work according to the terms of the contract. To this replication a demurrer was filed.

The point of the demurrants upon the argument was that the ground upon which the plaintiffs based their right of action in their replication, was a clear departure from the position taken by them in their declaration.

The counsel for the plaintiffs contended that the replication fortified the case made by the declaration, and so was legitimate. The design of a replication is to put upon the record some new facts which show that, notwithstanding the existence of the matters pleaded by the defendants, the declaration is yet true.

Thus, if plaintiff declares upon a statute, and defendant pleads that it is repealed, a replication that it has been revived by a subsequent act, is good. For the reviving act gives renewed effect to the first, on which the action is founded. Gould on Plead., 455.

So, if in trespass the defendant justifies for a distress damage feasant, the plaintiff may reply that the defendant afterwards converted to his own use, for this shows the taking to be a trespass *ab initio*. Comyn's Dig., *tit.* "Pleader," §11.

These are obvious instances of a fortification of the position first taken by the pleader. But in the two pleadings of the plaintiffs in the present case it appears manifest that the ground upon which the plaintiff rests his claim is in each distinct. He assumes on each that he has a condition to perform as a precedent to his right to recover compensation. He first says "I performed it." He next says "I did not perform it, but was ready to do so, and you hindered me."

The performance of such a condition, and an excuse for not performing it, are matters so distinct that good pleading requires the certain averment of that one upon which the party relies. They

are so treated by Mr. Chitty, he giving the rules that regulate the pleading of a performance of conditions precedent, and also the averments necessary in setting out an excuse of performance by the plaintiff. In regard to the latter he remarks: "In stating an excuse for non-performance of a condition precedent, the plaintiff must in general show that the defendant either prevented the performance or rendered it unnecessary to the prior act by his neglect or by his discharging the plaintiff from performance." Chitty on Plead., p. 326.

But the point involved here is not new. Thus, Mr. Gould, citing Co. Litt. 304 *a*, and 1 Sid. 10, says: "If in covenant broken the defendant pleads performance in general terms, and the plaintiff replies non-performance of a particular act, a rejoinder that the defendant was ready to perform, and tendered performance, and that the plaintiff prevented it, is a departure from the plea; performance, and tender and refusal being distinct and inconsistent grounds of defence. The matter rejoined should have been pleaded in the first instance." Gould on Plead., 455.

In the present case the plaintiffs rest their case upon performance of a preceding covenant. In the case mentioned by Mr. Gould the defendant rested his defence upon the performance of his covenant.

In neither case could the parties in a subsequent pleading shift their ground of attack or defence from performance to an excuse for non-performance.

There should be judgment for the defendants, with costs.

## HOWARD v. JENNISON.

KING'S BENCH. 1696.

[Reported 1 *Salkeld*, 223.]

AN action on the case for work done was brought by a tailor, and six several promises laid, all upon the 16th of October; the defendant pleaded *infra statum* to all generally; the plaintiff replied as to two promises, *procludi non, &c. quia* the defendant was at that time of full age, and as to the rest, that they were *pro necessario restitui*; hereupon the defendant demurred, alleging that this was repugnant; that the defendant could not at the same time be of full age and not of full age: but the Court held, That time was but a circumstance in nowise material, nor part of the issue; that a man

is not tied to a precise day in his declaration; and if the defendant force him to vary, it is no departure. Judgment *pro quer*.<sup>1</sup>

[Stephen, *Pleading*, Williston's edition, \* 253-\* 255.]

It has been seen that the declarations are conceived in very general terms; a quality which they derive from their adherence to the tenor of those simple and abstract formulæ, — the original writs — by which all suits were in ancient times commenced. The effect of this is, that, in some cases, the defendant is not sufficiently guided by the declaration, to the real cause of complaint; and is, therefore, led to apply his plea to a different matter from that which the plaintiff has in view. A new assignment is a method of pleading to which the plaintiff in such cases is obliged to resort in his replication, for the purpose of setting the defendant right. An example shall be given in an action for assault and battery. A case may occur in which the plaintiff has been twice assaulted by the defendant; and one of these assaults may have been justifiable being committed in self-defence, — while the other may have been committed without legal excuse. Supposing the plaintiff to bring his action for the latter, it will be found, by referring to the example formerly given of a declaration for assault and battery, that the statement is so general, as not to indicate to which of the two assaults the plaintiff means to refer. The defendant may, therefore, suppose, or affect to suppose, that the first is the assault intended, and will plead *son assault demesne*, as in the example *supra*, \* p. 190. This plea the plaintiff cannot safely traverse; because, as an assault was in fact committed by the defendant, under the circumstances of excuse here alleged, the defendant would have a right, under the issue joined upon such traverse, to prove those circumstances, and to presume that such assault, and no other, is the cause of action. And it is evidently reasonable that he should have this right; for, if the plaintiff were, at the trial of the issue, to be allowed to set up a different assault, the defendant might suffer by a mistake into which he had been led by the generality of the plaintiff's declaration. The plaintiff, therefore, in the case supposed, not being able safely to traverse,

<sup>1</sup> A departure may be taken advantage of on general demurrer; but not after verdict by motion in arrest of judgment. *Burdick v. Kenyon*, 20 R. I. 498.

In some jurisdictions objection may be taken at the trial by a motion to exclude evidence. *Plummer, Perry & Co. v. Rohman*, 61 Neb. 61, 84 N. W. 600. — Ed.



and having no ground either for demurrer, or for pleading in confession and avoidance, has no course, but by a new pleading, to correct the mistake occasioned by the generality of the declaration, and to declare that he brought his action, not for the first, but for the second assault; and this is called a new assignment.<sup>1</sup>

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## SECTION V.

### *Amendments.*

[Stephen, *Pleading*, Williston's edition, \*80-\*82.]

DURING the course of the pleading, if either party perceives any mistake to have been committed in the manner of his allegation; or, if, after issue joined on demurrer for matter of form, he should think the issue likely to be decided against him, he ought to apply, without delay, for leave to amend. It is proper, therefore, now to take some notice of the law of amendment.

Under the ancient system, the parties were allowed to correct and adjust their pleadings during the oral altercation, and were not held to the form of statement that they might first advance. So at the present day, until the judgment is signed, in the manner to be afterwards mentioned, either party is, in general, at liberty to amend his pleading as at common law; the leave to do which is granted as of course, upon proper and reasonable terms, including the payment of the costs of the application, and sometimes the whole costs of the cause up to that time. And the court will allow an amendment at common law, in some cases, even after a demurrer has been argued. Besides which, the court has a power, by statute, to allow an amendment after judgment has been actually signed and recorded; and of late, the judges have been much more liberal than formerly, in the exercise of this discretion. Amendments are, however, always limited by due consideration of the rights of the opposite party; and where, by the amendment, he would be put to unfair disadvantage, it is not allowed.

<sup>1</sup> In many jurisdictions new assignments are no longer in use. If the plaintiff's declaration is general and the defendant interposes an affirmative defense which the plaintiff conceives is applicable to a different matter from that on which he intends to rely, the plaintiff may amend his declaration. *McFarlane v. Ray*, 14 Mich. 465. — Ed.

## FITZPATRICK v. GEBHART.

SUPREME COURT OF KANSAS. 1871.

[Reported 7 *Kansas*, 35.]

VALENTINE, J.<sup>1</sup> . . . The court properly allowed the plaintiff below to amend the prayer of his petition, and also properly allowed the amendment to be made by *interlineation*. Neither was it an abuse of judicial discretion. The amendment was short, and scarcely, if at all, material. Amendments of pleadings may be made in three ways, subject to the discretion of the court; first, by *interlineation*; second, by writing the amendment, and the amendment only, on a separate piece of paper, and referring to the original; third, by rewriting the original, and incorporating the amendment in it.<sup>2</sup> . . .

## BUDDING v. MURDOCH.

CHANCERY DIVISION. 1875.

[Reported 1 *Chancery Division*, 42.]

THIS was a suit instituted to enforce a right claimed by the Plaintiff to the flow of water along an artificial watercourse. The bill rested the Plaintiff's title, 1, on a deed; 2, on prescription.

The cause now came on to be heard on motion for decree. It appeared that both parties were under some misapprehension as to the contents of the deed on which the Plaintiff relied. The Court was of opinion that the title set up by the Plaintiff, both under the deed and by prescription, failed. It was then contended that the watercourse had been constructed by the Plaintiff at considerable expense, with the privity of a predecessor in title of the Defendant, who had stood by and acquiesced; and that the Plaintiff was entitled to maintain the suit on this ground.

The MASTER OF THE ROLLS said that the case now set up by the Plaintiff was not raised by the bill; and if the suit had come to a hearing before the recent Act, the question whether the Plaintiff should be allowed to amend would have required great consideration, having regard to the decision in *Lord Darnley v. London*,

<sup>1</sup> A part of the opinion is omitted. — Ed.

<sup>2</sup> In some jurisdictions amendment by *interlineation* is forbidden by statute or rule of court. See 1 *Encyc. of Pl. and Pr.* 642. — Ed.

Chatham, and Dover Railway Company. Under the circumstances, he thought the new practice ought to be applied, and that the Plaintiff ought to have liberty to amend; and he made an order accordingly, with liberty for the Defendant to put in a further answer, and both parties to go into further evidence. All costs to be reserved till the further hearing.

KLIPSTEIN *v.* RASCHEIN.

SUPREME COURT OF WISCONSIN. 1903.

[Reported 117 *Wisconsin*, 248.]

FOR a complaint plaintiff stated, in effect, that during negotiations had by him with defendant respecting the purchase of a horse he asked defendant if the animal was suitable for farm work and would work well in hauling heavy loads, to which answer was made in the affirmative and that defendant would warrant the horse in that regard; that plaintiff relied upon such assurance and bought the horse of defendant, paying him therefor \$125; that the animal was in fact a balky horse and entirely unfit for use on a farm or for hauling heavy loads; that defendant well knew such to be the case when he made the representations aforesaid; that upon plaintiff's discovering the facts in regard to the true character of the horse he tendered the animal back to defendant and demanded a return of his money, which demand was refused, and that plaintiff was damaged by the breach of warranty alleged in the sum of \$100, for which he asked judgment with costs.

Defendant answered, denying the allegations of the complaint as to the horse being balky or being warranted to plaintiff in any manner. The court construed the complaint as setting forth a cause of action to recover damages upon a fraudulent warranty. During the trial plaintiff applied for leave to strike out of the complaint the allegations which in the judgment of the court gave it the character of one for the recovery of damages for actionable fraud. The application was denied. The case, under the rulings of the court, against objections of appellant's counsel, was tried and submitted to the jury as an action sounding in tort. The verdict was in defendant's favor.

MARSHALL, J.<sup>1</sup> . . . It is claimed the court erred in refusing appellant's application to strike out of the complaint the allega-

<sup>1</sup> A part of the opinion is omitted. — Ed.

tions showing that defendant falsely represented the character of the horse with actual or constructive knowledge of the facts. To sustain that cases are cited where, there being two causes of action set out in the complaint, one sounding in tort and one in contract, and there being no demurrer for misjoinder of causes of action, it was held proper to allow a recovery upon one of them and to permit the other to be stricken out or disregarded as surplusage. The situation is different here. True, the complaint contains all the allegations necessary to state a cause of action on contract, but no such cause of action was in fact stated or attempted to be stated. What appellant's counsel desired was not to strike out one cause of action from the complaint and leave another, but to strike out one part of a cause of action, leaving the balance to stand as setting forth a cause of action of an entirely different character, — to amend the complaint by changing the form of the action. That is not permissible. The limit of the power of the court to allow amendments of pleadings will be found fully discussed in *Gates v. Paul*, *ante*, p. 170, 94 N. W. 55. The rule stated definitely in *Carmichael v. Argard*, 52 Wis. 607, 609, 9 N. W. 470, and *Post v. Campbell*, 110 Wis. 378, 382, 85 N. W. 1032, governs the subject. . . .

*By the Court.* The judgment is affirmed.<sup>1</sup>

## MERRILL v. PERKINS.

SUPREME COURT OF NEW HAMPSHIRE. 1879.

[Reported 59 *New Hampshire*, 343.]

CASE, for entering the house occupied by the plaintiff and her husband and children, and taking out the doors and windows, tearing up the floor, and making a noise and disturbance, whereby the plaintiff was exposed, frightened, and disturbed, prematurely delivered of a child, and seriously injured in health. The defendant's objection, that the plaintiff cannot recover in this form of action, was overruled. . . . Verdict for the plaintiff.

DOE, C. J.<sup>2</sup> The objection to the form of action might have been obviated at the trial by an amendment of the declaration, adding a new count in trespass. *Stebbins v. L. Ins. Co.*, 59 N. H.

<sup>1</sup> See *Anderson v. Wetter*, 103 Me. 257, 69 Atl. 105, 15 L. R. A. (N.S.), 1003. Compare *Bruheim v. Stratton*, *supra*, p. 105. — ED.

<sup>2</sup> A part of the statement of facts and a part of the opinion are omitted. — ED.



143. And as the amendment, if made before the trial, would not have affected the trial or the verdict, it may be made now without disturbing the verdict. *Roulo v. Valcour*, 58 N. H. 347. It does not appear to be necessary to inquire whether case, or trespass, is the right form of action. . . .

When the amendment is made, there will be

*Judgment on the verdict.*<sup>1</sup>

ALLEN, J., did not sit: the others concurred.

### HERBERT *v.* DE MURIAS and ROCK.

SUPREME COURT OF NEW YORK, APPELLATE DIVISION,  
FIRST DEPARTMENT. 1906.

[Reported 115 *New York Appellate Division*, 453.]

APPEAL by the defendants, Fernando E. De Murias and another, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 7th day of September, 1906, denying the defendants' motion for leave to serve an amended answer.

PER CURIAM: As a general rule a party should be permitted to put his pleading in such shape as will satisfactorily present every question affecting his interest in the litigation, and to this end the court is disposed to use with liberality the power conferred by statute to permit amendments of pleadings during the progress of the action. *Muller v. City of Philadelphia*, 113 App. Div. 92. The exercise of this power, however, is controlled by the consideration that a party should not, by laches or otherwise, place his opponent at an unfair disadvantage, and for this reason an amendment which otherwise would be freely allowed is often refused because of the laches of the party moving. Mere laches, however, are not always an unanswerable objection to an amendment,

<sup>1</sup> See 1 Encyc. of Pl. and Pr. 574.

REVIEW. If the trial court allows an amendment when it is beyond its power to allow it, its order is reviewable. *New York, etc., Assn. v. Remington Ag. Works*, 89 N. Y. 22; 1 Encyc. of Pl. and Pr. 531.

The refusal to allow a proper amendment on the ground that the court has no power to allow the amendment, is based on an error of law and is reviewable. *Dunnett v. Thornton*, 73 Conn. 1, 46 Atl. 158; *Sanger v. Newton*, 134 Mass. 308.

As to review in other cases, see *Home Ins. Co. v. Overturf*, 35 Ind. App. 361, 74 N. E. 47; *Le Mars Building & Loan Assn. v. Burgess*, 129 Ia. 422, 105 N. W. 641; *Fay v. Hunt*, 190 Mass. 378, 77 N. E. 502. — Ed.

especially if no prejudice will arise therefrom to the party opposing the motion. In the present case the action is for money alleged to have been obtained from plaintiff by fraud. The defendants have already served an original and one amended answer, and having changed their attorney, now seek to serve a second amended answer amplifying their defense that the plaintiff by certain acts has waived the tort of which he complains. It is true that no very cogent reason is given why this defense was not properly pleaded before, and the defendants have unquestionably laid themselves open to the imputation of laches. We are unable to see, however, that any disadvantage will come to plaintiff if the motion be granted upon proper terms. The action was commenced in April, 1906, and the amended answer served on June fourth. The present motion was made on August twenty-seventh. The action has been noticed for trial for the October term, but has not yet appeared upon the day calendar. The defendants' laches are not, therefore, very gross.

The order should be reversed, without costs, and the motion granted on condition that within five days after the entry and service of the order to be entered hereon the defendants serve their proposed second amended answer and pay to plaintiff's attorney all costs of the action to date and ten dollars costs of motion, the cause to retain its number, date of issue and place upon the trial calendar.

Present — INGRAHAM, McLAUGHLIN, CLARKE, HOUGHTON and SCOTT, JJ.

Order reversed, without costs, and motion granted on conditions stated in opinion. Order filed.<sup>1</sup>

## WELDON v. NEAL.

COURT OF APPEAL. 1887.

[Reported 19 *Queen's Bench Division*, 394.]

APPEAL of plaintiff from the order of the Queen's Bench Division (Field and Wills, JJ.) directing certain paragraphs of the statement of claim to be struck out.

The facts were as follows: —

<sup>1</sup> But when by the allowance of the amendment the plaintiff is put in a worse position than that in which he would have been placed if the defendant had correctly pleaded in the first instance, the amendment will not be allowed. *Steward v. North Metropolitan Tramways Co.*, 16 Q. B. D. 556. — ED.

The plaintiff commenced an action for slander on 1st September, 1883. At the trial the judge nonsuited the plaintiff on the ground that the alleged slander was not actionable without special damage, and that the plaintiff had not alleged any special damage, and refused to give leave to amend. The plaintiff subsequently obtained from the Court of Appeal an order for a new trial with leave to amend her statement of claim. On the 6th April, 1887, she amended her statement of claim.

The statement of claim as amended set up in addition to the claim for slander fresh claims in respect of assault, false imprisonment and other causes of action, which at the time of such amendment were barred by the Statute of Limitations, although not barred at the date of the writ.

The Divisional Court ordered the paragraphs stating such fresh causes of action to be struck out on the ground that amendments ought not to be allowed which would deprive the defendant of the benefit of the Statute of Limitations.

LORD ESHER, M.R. We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so.

This case comes within that rule of practice, and there are no peculiar circumstances of any sort to constitute it an exception to such rule. For these reasons I think the order of the Divisional Court was right and should be affirmed.

LINDLEY, L. J. I am of the same opinion. I do not think it would be just to the defendant to allow these amendments, the effect of which would be to deprive him of his defence under the Statute of Limitations.

LOPES, L. J. I am of the same opinion. I think the Court ought to give all reasonable indulgence with regard to amending, and I quite agree with the rule that has been laid down, viz., that, however negligent or careless the first omission and however late

the proposed amendment, the amendment should be allowed if it can be allowed without injustice to the other side. But here the amending paragraphs set up causes of action which were not in the original claim and which are now barred by the Statute of Limitations. The effect of allowing those amendments would be to take away from the defendant the defence under that statute and therefore unjustly to prejudice the defendant.

I think the appeal should be dismissed. *Appeal dismissed.*<sup>1</sup>

SONTUM v. MAHONING & SHENANGO RY., &c., CO.

SUPREME COURT OF PENNSYLVANIA. 1910.

[Reported 226 *Pennsylvania*, 230.]

TRESPASS to recover damages for death of plaintiffs' son. . . . Verdict and judgment for plaintiffs for \$4,106.85. Defendants appealed.

ELKIN, J.<sup>2</sup> This suit was brought within the statutory period by the father while the name of the mother was added by amendment more than a year after the expiration of the time in which the action must be instituted under the statutes. The first assignment challenges the correctness of the ruling of the court in permitting the amendment. The right to add the name of a husband,

<sup>1</sup> See *Mumma v. Mumma*, 246 Pa. 407, 92 Atl. 504; 25 Cyc. 1305; 1 Encyc. of Pl. and Pr. 621; 3 L. R. A. (N.S.), 259; Ann. Cas. 1914 C, p. 1425.

In *Foster v. St. Luke's Hospital*, 191 Ill. 94, 60 N. E. 803, the plaintiff, as executor, brought an action to recover damages for the death of his testatrix. The declaration as originally filed failed to allege that the deceased left a husband or next of kin. An amendment was filed more than two years (the statutory period) after the accident, alleging that the plaintiff was the sole heir and beneficiary of the deceased. It was held that the action was barred by the statute of limitations.

In *Stanley v. Anderson*, 107 Mich. 384, 387, 65 N. W. 247, the court said: "It is manifest that the new declaration counts upon the same contract and the same breach as was attempted to be counted upon by the former one. One and the same cause of action was set up, or attempted to be stated, in both; and counsel's contention must rest upon the somewhat technical proposition that, because the first declaration was defective in alleging the cause of action, to the extent that it did not contain a sufficient allegation of a breach, no cause of action was set up, and of necessity the amended declaration, which did set up a cause of action, must state a new and different one. We think this contention is too technical, and that the cases cited are so readily distinguishable in this respect as not to call for a discussion of them." — Ed.

<sup>2</sup> Only a part of the opinion is here given. — Ed.



or of a wife, by way of amendment after the expiration of the statutory period, if either one had properly brought suit within the time limited, is no longer an open question. It has been squarely ruled in several recent cases: *Waltz v. R. R. Co.*, 216 Pa. 165; *Holmes v. R. R. Co.*, 220 Pa. 189; *Bracken v. R. R. Co.*, 222 Pa. 410.<sup>1</sup> . . .

### COYNE *v.* LAKESIDE ELECTRIC RAILWAY CO.

SUPREME COURT OF PENNSYLVANIA. 1910.

[Reported 227 *Pennsylvania*, 496.]

PER CURIAM. These actions grew out of the same accident and were tried together. The only question raised by the appeals is whether the court erred in overruling the plaintiff's motion to amend the record by striking out the name of the defendant and substituting the name of another corporation, its lessee. The accident happened February 11, 1906. The motion to amend was made March 26, 1908, after the testimony at the trial was all in and it had been shown that the defendant named in the writ was the lessor of the railroad and had nothing to do with its operation. The statute of limitations had become a bar to a new action. The mistake was not, as in *Wright v. Eureka Tempered Copper Co.*, 206 Pa. 274, in bringing the right defendant into court under a wrong name, but in suing the wrong party. The well-defined limitation of the right of amendment is that a new cause of action shall not be introduced or new parties brought in after the statute of limitations has become a bar: *LaBar v. Railroad Co.*, 218 Pa. 261; *Holmes v. Railroad Co.*, 220 Pa. 189.

*The judgment is affirmed.*<sup>2</sup>

### MORTON *v.* SHAW and Another.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1906.

[Reported 190 *Massachusetts*, 554.]

KNOWLTON, C. J.<sup>3</sup> This is an action on a bond to dissolve an attachment. The condition of the bond is that "the defendants shall pay to the plaintiff in said action the amount, if any, which

<sup>1</sup> See *Service v. Farmington Savings Bank*, 62 Kan. 857, 62 Pac. 670. — Ed.

<sup>2</sup> See *Woodward v. Ware*, 37 Me. 563; *Shaw v. Cock*, 78 N. Y. 194. But see *McLaughlin v. West End St. Ry. Co.*, 186 Mass. 150, 71 N. E. 317. — Ed.

<sup>3</sup> Only the opinion of the court is here given. — Ed.

he shall recover therein," etc. Judgment has been recovered, and the sureties set up, as their only defence, that they have been discharged from liability by an amendment of the declaration in the original action.

The law applicable to their contention has been fully considered and settled in recent cases. *Driscoll v. Holt*, 170 Mass. 262. *Doran v. Cohen*, 147 Mass. 342. *Townsend National Bank v. Jones*, 151 Mass. 454. *Norris v. Anderson*, 181 Mass. 308. *Dietrich v. Wolffsohn*, 136 Mass. 335. In the first of these cases the discussion is so full, and covers this case so clearly, that it seems superfluous to add anything. The statute is R. L. c. 173, § 121. As the amendments were allowed without notice to sureties, it is open to them to contest the effect of the amendments. But if their effect was merely to put in proper form the statement of the cause of action upon which the action was brought, they are binding upon the sureties, even though they greatly change the form of statement of the claim, or greatly enlarge the amount claimed according to the language of the original declaration.

In the present case the recovery was on the second amended count. That differs from the original declaration in two particulars. The original states the claim as founded upon a written contract for the sale of goods. In the opinion (*Morton v. Clark*, 181 Mass. 134) the court said: "The plaintiff declared on the memorandum as a contract in writing, and not on an oral contract of which the writing is a memorandum. . . . If the declaration had been upon an oral contract . . . and had treated the writing as a mere memorandum not intended as a formal contract, . . . different questions would have arisen which we need not now consider," etc. The amendment to the declaration corrected this error in the pleading.

There was another error in the declaration which was entirely clerical. The contract was for the sale of four thousand sides of leather, and the declaration averred that the defendant delivered 28,538 sides of leather, and neglected and refused to deliver the remaining 11,462 sides of leather. The fact was that 11,462 sides had been delivered, and the defendants had neglected and refused to deliver the remaining 28,538 sides. This mistake of statement was corrected in the amended declaration.

Such changes as these do not introduce a new cause of action. They merely put the pleadings in form properly to present to the court the original cause of action for which the action was brought.

The substance of the decision in *Prince v. Clark*, 127 Mass. 599, is that the amendment changed the cause of action, so as to enable the plaintiff to recover for that which he did not intend to include when he brought his action, but introduced later, through the amendment, in order to relieve himself of the consequences of a mistake in another case, made after his writ was entered. Although the amendment was binding on the defendants in the action in which it was made, it ought not to have been allowed. This decision does not affect the law as stated in the other cases above cited.

*Judgment for the plaintiff.*<sup>1</sup>

### FREEMAN v. CREECH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1873.

[Reported 112 *Massachusetts*, 180.]

WRIT OF ENTRY to recover land in Boston. It appeared from an agreed statement of facts that both parties claimed title from one Wentworth; that one McNiel sued Wentworth in an action of contract, and attached the land in question; that, after the attachment, Wentworth mortgaged the premises; that the mortgage title by assignment came to the demandant; that after the making of the mortgage McNiel filed an amended declaration containing additional counts; that it did not appear upon the record that the original and the amended declaration were for the same cause of action; that the case was heard before a referee upon the amended declaration; that afterwards McNiel obtained judgment upon the referee's award; that execution issued and was levied upon the demanded premises; and that the tenant claimed title through this levy.

It was admitted, "if legally provable by oral testimony, that neither of the claims set forth in the third and fourth counts of the amended declaration was included in the original declaration, and that the referee included in his award the amount claimed in the third count, and at least a part of the amount claimed in the fourth count."

Upon the statement of facts, judgment was ordered in the Superior Court for the tenant, and the demandant appealed.

<sup>1</sup> See *Commonwealth v. Baxter & Co.*, 235 Pa. 179, 84 Atl. 136, 42 L. R. A. (N.B.), 484. Compare *Christal v. Kelly*, 88 N. Y. 285; *Mathews Slate Co. v. Sweeney*, 219 Mass. 285, 106 N. E. 975. — Ed.

BY THE COURT. The demandant, as subsequent purchaser, is not shown to have had any notice of the amendment of the declaration in the action in which the attachment was made under which the tenant claims title. It does not appear on the face of the original and amended declarations that they were for the same cause of action, and oral evidence is therefore admissible to show whether they were or were not. It being admitted, if legally provable by such evidence, that claims not included in the original declaration were included in the amended declaration, and in the award and judgment and levy of execution on which the tenant relies, the attachment was dissolved, and the levy gave no title, as against this demandant. His title is therefore better than the tenant's. Gen. Sts. c. 129, § 82. *Hill v. Hunnewell*, 1 Pick. 192. *Willis v. Crooker*, Ib. 204, 206, note. *Wood v. Denny*, 7 Gray, 540, 542.

*Judgment for the demandant.*

MISSOURI, REVISED STATUTES (1909).

SEC. 1848. The court may, at any time before final judgment, in furtherance of justice, and on such terms as may be proper, amend any record, pleading, process, entry, return or other proceedings, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved.<sup>1</sup>

SEC. 1850. The court shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

SEC. 1851. After final judgment rendered in any cause, the court may, in furtherance of justice, and on such terms as may be just, amend in affirmance of such judgment any record, pleading, process, entries, returns or other proceedings in such cause, by adding or striking out the name of a party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by rectifying defects or imperfections in matters of form, and such judgment shall not be reversed or annulled therefor.

<sup>1</sup> See 1 Encyc. of Pl. and Pr. 541 *et seq.* — Ed.



## THE NEW JERSEY PRACTICE ACT (1912)

SEC. 23. No civil suit or proceeding in any court of common law shall fail or be dismissed on the ground that the plaintiff or any party therein has mistaken the remedy or procedure, if the court in which the matter is pending shall have jurisdiction to grant the remedy by any procedure; but in such case, the court shall, upon terms, order the writs, pleadings and other proceedings to be so amended, or new writs, pleadings or other proceedings to be respectively so issued, filed or taken, that the court may completely and finally hear and determine the whole matter in controversy between the parties and grant the proper remedy.

SEC. 24. In addition to the present powers of amendment, the court may, upon terms, permit, before or at the trial, the statement of a new or different cause of action in the complaint or counterclaim.

## CHAPTER VII.

### TRIAL.

#### SECTION I.

##### *Trials at Nisi Prius and at Bar.*

[Stephen, *Pleading* (Williston's ed.), \*87-\*89.]

IN ancient times and before the introduction of the *nisi prius* clause, the trial used always to take place in the court itself at Westminster, and this is still indicated by the language of the *venire*, which directs the sheriff to summon the jury to appear *there*, and there only. But from a very remote period this course of proceeding has been disused, except in some few cases, to be presently noticed. The trial, in modern practice, generally takes place before the judge or judges of assize and *nisi prius*, instead of the judges of the court of Westminster; and hence the record of the proceedings made up for trial is usually made up with a *nisi prius* clause, as in the preceding example, and is denominated THE NISI PRIUS RECORD. This record is delivered to the judges of assize and *nisi prius* as their commission for the trial of the cause, and also serves for their guidance as to the nature of the issue to be tried. The trials before these judges, called trials *at nisi prius*, now take place in London and Westminster several times in the course of each term, and also during a considerable part of each vacation; in every other county they are held twice a year, and always in time of vacation. The justices of assize and *nisi prius* for trials in London and Middlesex consist of the chief justices of the three courts respectively, each trying only the issues from his own court. For trials in the other counties they consist of such persons as are appointed for the purpose by temporary commission from the crown, among whom are usually, for each circuit, two of the judges of the superior courts, the whole kingdom being at present divided into seven circuits for the purpose.

Though the trial by jury is thus, in general, had at *nisi prius*, this is not universally the case; for in causes of great difficulty and consequence, these inquests are allowed to be taken before the four judges in the superior court, in which the pleading took place, —

as in the ancient practice. The proceeding is then technically said to be a trial *at bar*, by way of distinction from the trial *at nisi prius*. In these cases the record is, of course, made up for trial, without any *nisi prius* clause, and the *distringas* directs the jury to appear in the superior court only.

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## SECTION II.

### *Challenges.*

[Smith, *Action at Law* (2d ed.), 107-109.]

WE will now suppose that the jury have been summoned, and are in attendance, and the cause called on (as it will be if properly entered) in its due turn. If no motion be made to put off the trial, and the plaintiff, being ready, is not forced to withdraw his record, the first step taken is to impanel and swear the jury. The jurors are called over and sworn, and, as they are called over, may, in the case of a common jury, if either party object to them, or any of them, be challenged. *Challenges* are either *to the array*, or *to the polls*. Challenges to the array are exceptions to the entire panel, in consequence of some partiality imputed to the sheriff or other officer who arrayed it. Challenges to the polls are exceptions to particular jurors, and are of four kinds: First, *Propter honoris respectum*, as, if a lord of parliament were to be impaneled: Secondly, *Propter defectum*, as, if one of the jurors be an infant, alien, idiot, or lunatic, or have not a sufficient estate: Thirdly, *Propter affectum*, or for partiality, and this is either *principal*, *i. e.*, carrying with it manifest ground of suspicion, or *to the favor*. A challenge is *principal* when the juror is related within the ninth degree to either party, or has been arbitrator, or is interested in the cause, or has an action depending with one of the parties, or has taken money for his verdict, or formerly been a juror in the same cause, or is master, servant, counsellor, steward, or attorney to, or of the same society or corporation with, one of the parties; all these are *principal* causes of challenge, which, if true, cannot be overruled, for jurors must be *omni exceptione majores*. A challenge *to the favor* is grounded only on some probable cause of suspicion, as acquaintance, or the like, the validity of which is determined by *triors*; these, if the first juror be challenged, are two indifferent persons named by the Court; if they find one man indifferent he shall be sworn, and he with the two *triors* shall try the next, and

when another is found indifferent and sworn, the two *triors* shall be superseded, and the two first sworn on the jury shall try the rest. Fourthly, *Propter delictum*; this species of challenge may take place when the juror is tainted by some crime or misdemeanor which affects his credit.

## GARDNER v. TURNER.

SUPREME COURT OF NEW YORK. 1812.

[Reported 9 *Johnson's Reports*, 260.]

A MOTION was made in behalf of the defendant, for judgment as in case of nonsuit, for not proceeding to trial in this cause, at the last circuit in Rensselaer county.

It appeared that after the cause had been twice passed in the calendar of causes without being brought on, it was again called, and the jury were about to be impaneled, when the plaintiff's attorney presented a challenge to the array, which stated that the clerk of the county, his deputy or agent, instead of drawing out of the box containing the names of jurors, thirty-six names, drew out the number of seventy-two names, which he put in a list, and then selected and marked thirty-six of the jurors, so drawn, and directed the sheriff of the county to summon the thirty-six jurors, whose names were so marked and designated, for the circuit court and *oyer* and *terminer*, and the others for the court of common pleas, and the sheriff accordingly summoned the thirty-six jurors so designated, for the circuit.

The attorney for the defendant stated to the judge, that the facts alleged in the challenge were untrue, and offered to take issue, if the judge thought the challenge ought to be received, or sufficient to prevent the trial of the cause. The judge refused to quash the *venire*, or pass the cause, on account of the challenge, and no issue in fact was taken thereon. The plaintiff's attorney then declined to bring on the cause.

In support of the motion, the affidavits, also, of the clerk and his deputy were read, denying the facts stated in the challenge to the array made by the plaintiff's attorney.

*Per Curiam.* The defendant moves for judgment as in case of a nonsuit for plaintiff's default, in not proceeding to trial at the last circuit court, in Rensselaer county, and he is entitled to the effect of his motion, if the plaintiff has been in default. The motion is



resisted on the ground that, at the circuit, the plaintiff challenged the array, for a supposed misconduct in the clerk, in drawing out seventy-two names, and designating thirty-six of them to be summoned as jurors to that circuit. This challenge was overruled by the judge, but the plaintiff declined to proceed to trial.

Either party has a right to challenge the array; and partiality, or some default in the sheriff or his under officer who arrayed the panel, are good causes of challenge. 2 Tidd, 779. If the facts alleged in the challenge are denied to be true, two *triors* are appointed by the court, out of the panel, Co. Litt. 158, or, perhaps, any two individual persons named by the court. If the *triors* pronounce the causes of challenge unfounded, the trial proceeds. If the facts are admitted, but are deemed insufficient, the court adjudges on them, and either quashes the array, or overrules the challenge. Since our statute authorizing the clerk to array the jury, a challenge lies to it, for partiality, or default in the clerk, who, for many purposes, is substituted for the sheriff, in selecting and arraying the jury. The facts set forth in the challenge amounted, if true, to a default in the clerk, in forming the array, and the defendant ought to have joined issue on the challenge; and if the *triors* had found, that the jury was not thus arrayed, then the cause must have proceeded, or the plaintiff would have been in default. The challenge should not have been overruled, and as it is, the plaintiff is not chargeable with a default in not proceeding to trial, for he had a right to the challenge, and, if well founded, it would be a sufficient cause for not going to trial.

It is now admitted that the facts stated in the challenge are unfounded; and could we believe that it was interposed merely to delay and interrupt the defendant, we ought, now, perhaps, to consider it as no excuse for not proceeding; this we are not authorized to do, but are bound to consider it interposed on information then received.

*Motion denied.*<sup>1</sup>

<sup>1</sup> See *Vanauken v. Beemer*, 1 South. (N. J.), 364; *Moore v. Navassa Guano Co.*, 130 N. C. 229, 41 S. E. 293; *Munshower v. Patton*, 10 Serg. & R. (Pa.), 334, in which it was held that the challenge should be allowed. See also *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567.

See *Commonwealth v. Walsh*, 124 Mass. 32; *Maffett v. Den*, 1 Halst. (N. J.), 228; *Ullman v. State*, 124 Wis. 602, 103 N. W. 6, in which the challenge was not allowed. See also *Martin v. Texas*, 200 U. S. 316, 50 L. ed. 497, 26 S. Ct. 338.

For the common law practice as to challenge to the array, see *King v. Edmunds*, 4 Barn. & Ald. 471. — Ed.

SCHMIDT v. THE CHICAGO AND NORTHWESTERN RY.  
CO. *et al.*

SUPREME COURT OF ILLINOIS. 1876.

[Reported 83 *Illinois*, 405.]

THIS was an action on the case, by Louisa Schmidt, against the Chicago and Northwestern Railway Company and the city of Chicago, to recover damages for the death of Frederick Schmidt, the plaintiff's intestate, caused by the negligence of the defendants, as was claimed. A trial was had, resulting in a verdict and judgment in favor of the defendants, to reverse which this appeal was taken.

WALKER, J.<sup>1</sup> It is first urged that the court erred in permitting each defendant to challenge peremptorily three jurors. The statute, chap. 110, sec. 49, p. 781, provides, that "In all civil actions, each party shall be entitled to a challenge of three jurors, without showing cause for such challenge." This provision has been in force since 1827, if not longer, and, as we understand, during all that time it has been the general practice, and so understood by the entire profession, that each side to the case, without reference to the number of persons in each, in all civil cases, have but three peremptory challenges; and this is true whether there be one or a number of persons plaintiff or defendant.

In the case of *Cadwallader v. Harris*, 76 Ill. 370, this court held, that "the word 'party,' when applied to the defendant, can only mean the person or persons named as defendant or defendants in the judgment." The definition given to the word as defined by lexicographers, is, a plurality of persons: as, a political party; a select company invited to an entertainment; a company made up for a given occasion; in military affairs, a detachment or a small number of troops, etc. Thus it is seen that the word is applied as well to a number of persons as to a single individual.

The provision in the Criminal Code is, that every person arraigned for any crime, etc., shall be admitted to challenge, etc. Here, we have very different language from that used in the Practice Act governing civil suits. And this difference seems too marked to have been accidental. It must have been intended to produce a different practice in the two classes of cases. In criminal proceedings, each person, when arraigned, whether alone or with

<sup>1</sup> A part of the opinion is omitted. — ED.

others, is to have the challenges specified; and in civil cases, the plaintiff or plaintiffs three peremptory challenges, and the defendant or defendants a like number. Hence we regard the practice, as unquestioned for half a century or more, to be a proper construction of the statute, and too firmly established to be shaken. . . .

*Judgment reversed.*<sup>1</sup>

## TRULLINGER v. WEBB.

SUPREME COURT OF INDIANA. 1851.

[Reported 3 *Indiana*, 198.]

BLACKFORD, J.<sup>2</sup> This was an action of trespass *quare clausum fregit*, brought by Webb against Trullinger. The *gravamen* is, that the defendant, with force and arms, broke and entered two certain coal-banks or veins of coal of the plaintiff, situate on the east half of the north-west quarter of section thirty-one, township nineteen north, range eight west, in Fountain county, Indiana, and dug out, &c.

The defendant pleaded not guilty. Verdict and judgment for the plaintiff.

The first error assigned is, that the Court improperly overruled a challenge to one of the jurors.

The bill of exceptions, on that subject, is as follows: The defendant challenged Jacob Kinney, one of the jurors, for the following cause, to-wit, that said juror, on being interrogated by the defendant, without being sworn to answer questions, disclosed the fact that he was related to the plaintiff in the following degree — by marriage with the plaintiff's niece; and the said juror, after being sworn to try said cause, repeated that said relationship existed, without being sworn to that fact; whereupon the defendant moved the Court to discharge said juror, which motion was overruled, and the juror permitted to be sworn in chief, and serve on the jury,

<sup>1</sup> *Stone v. Segur*, 11 Allen (Mass.), 568; *Bryan v. Harrison*, 76 N. C. 360, *accord*. But see *Stevens v. Union R. R. Co.*, 26 R. I. 90, 58 Atl. 492, 66 L. R. A. 465. Compare *Cornell-Andrews Smelting Co. v. Boston & Prov. R. R. Corp.*, 202 Mass. 585, 89 N. E. 118; *Waggoner v. Dodson*, 96 Tex. 6, 68 S. W. 813. See Thompson, *Trials*, 2d ed., see. 46.

On the question of right to peremptory challenges in civil actions in the absence of statutory provisions, see *Creed v. Fisher*, 9 Exch. 472. — Ed.

<sup>2</sup> A part of the opinion is omitted. — Ed.

in said cause. To the overruling of which motion the defendant excepts.

We have no doubt but that the cause of challenge was sufficient. Lord Coke's language, on the subject, is as follows: Affinity or alliance by marriage is a principal challenge, and equivalent to consanguinity, when it is between either of the parties, as if the plaintiff or defendant marry the daughter or cousin of the juror, or the juror marry the daughter or cousin of the plaintiff or defendant, and the same continues, or issue be had. Coke Litt. 157.

The plaintiff contends that the juror, when questioned as to the cause of the challenge, should have been sworn. There is no doubt but that the plaintiff might have objected to the examination of the juror without oath; but the plaintiff, by permitting the questions to be put to the juror, and answered by him, without requiring him to be sworn, waived the objection. The Circuit Court, instead of permitting the juror to be sworn on the jury, should have sustained the challenge. . . .

*Per Curiam.* — The judgment is reversed with costs. Cause remanded, &c.<sup>1</sup>

## HUFNAGLE v. DELAWARE & HUDSON COMPANY.

SUPREME COURT OF PENNSYLVANIA. 1910.

[Reported 227 *Pennsylvania*, 476.]

MOSCHZISKE, J.<sup>2</sup> . . . In the calling of the jury counsel for the plaintiff challenged two of the panel for cause, alleging that they were employed by the defendant company. The court sustained the challenge stating: "Taking it as a fact that the only ground for challenge for cause is that these two jurors are simply employees, one a miner and the other a division superintendent of some of the collieries of the defendant Company, the court is of opinion that the challenge should be sustained." While no Pennsylvania case with facts precisely like the one under consideration has been called to our attention, yet the general principle is laid down in our cases that no person should be permitted to serve on a jury who stands in any relation to a party to the cause that would "carry with it *prima facie* evident marks of suspicion of favor," as where

<sup>1</sup> As to disqualification of jurors for relationship or affinity, see *Hardy v. Sprowle*, 32 Me. 310; *Bigelow v. Sprague*, 140 Mass. 425, 5 N. E. 144. — ED.

<sup>2</sup> The statement of facts and a part of the opinion are omitted. — ED.



a litigant is in a position where "he might exercise a control over the juror," such as the relation of master and servant: *Pipher v. Lodge*, 16 S. & R. 214; *Harrisburg Bank v. Forster*, 8 Watts, 304; *Cummings v. Cann*, 52 Pa. 484. In the present case the trial judge applied the rule to the relation of employer and employee, and in this there was no error. . . .

The assignments of error are all overruled, and the judgment is affirmed.<sup>1</sup>

## MURCHISON NATIONAL BANK *v.* DUNN OIL MILLS COMPANY and BARNES.

SUPREME COURT OF NORTH CAROLINA. 1909.

[Reported 150 *North Carolina*, 683.]

WALKER, J.<sup>2</sup> . . . The defendants, having exhausted their peremptory challenges, objected to a juror, Samuel Bear, who admitted that he is a stockholder in the plaintiff bank. The court, upon evidence, found that, notwithstanding the fact of his being a stockholder, he was "a fair and unbiased juror," and overruled the challenge. In this ruling, we think, there was error. It is very true, the cause of challenge is not one of those specified in the statute, but they are merely cumulative, and it was not the intention of the Legislature to repeal the fundamental principle of the common law forbidding a person to sit in judgment when his own interests are involved. Whether there are any circumstances which will justify a departure from this elementary rule by reason of the necessity of the case, we need not consider, as no such necessity arose in the trial of the present action. The only question presented is, was the juror competent to sit in the case? He was a stockholder of the plaintiff bank, and therefore had a direct pecuniary interest in the result of the trial. This cannot well be questioned. He was therefore made a judge in his own cause without any sufficient reason in law to sustain the ruling of the court. Whether he was actually biased or not is immaterial. Suppose a plaintiff in a case is called as a juror. Could we hesitate to declare his incompetency? The difference between such a case

<sup>1</sup> Compare *Georgia Railroad and Banking Co. v. Tice*, 124 Ga. 459, 52 S. E. 916, 4 Ann. Cas. 200; *Murphy v. Southern Pac. Co.*, 31 Nev. 120, 101 Pac. 322, 21 Ann. Cas. 502; *Sansouwer v. Glenlyon Dye Works*, 28 R. I. 539, 68 Atl. 545. — Ed.

<sup>2</sup> A part of the opinion is omitted. — Ed.

and the one before us, where the juror is the holder of stock in the plaintiff bank, is one that relates, not to the fact, but to the degree of interest. . . .

The principle as applicable to a stockholder is clearly and strongly stated in *Page v. Railroad*, 21 N. H. 438, as follows: "The juror, who owned stock in the Concord and Claremont road, was, therefore, by virtue of this contract, directly interested in the result of the cause, which he assisted to try. His interest was probably very trifling in amount, and may not have influenced his judgment at all on the question of damages. But the principle is extremely well settled that any, even the smallest, degree of interest in the question pending is a decisive objection to a juror." Citing *Hesketh v. Braddock*, 3 Burrows, 1856; *Hawkes v. Kennebeck*, 7 Mass. 464; *Wood v. Stoddard*, 2 Johns. (N. Y.), 194. The authorities are quite uniform to the effect that a stockholder is not a competent juror if the corporation in which he is a stockholder is a party to the action. *Railroad v. Howard*, 20 Mich. 18; *Fleeson v. Savage*, 3 Nevada, 157; *Silvis v. Ely*, 3 Watts and Serg. (Pa.), 420; *Essex v. McPherson*, 64 Ill. 349; *Railroad v. Hart*, 60 Ga. 550. See, also, *Zimmerman v. State*, 115 Ind. 129; *Railroad v. Barnes*, 40 Mich. 383; *Dimes v. Canal*, 3 H. L. Cases, 759. It was held that, by the common law, a stockholder, on account of his interest in the corporation, could not be a competent witness for it. *Porter v. Bank*, 19 Vermont, 410; *McAuley v. York Co.*, 6 Cal. 80. In *Silvis v. Ely*, *supra*, Rogers, J., said: "The first error (assigned) is in rejecting a person because he was a stockholder and director in the Farmers Bank of Reading. Interest is a principal cause of challenge, and for that reason the juror was incompetent in a cause in which the bank had an interest." In this case the defendants joined in the challenge, as they had the right to do, and the oil company can avail itself, on this appeal, of the error of the court in overruling the challenge. It has been compelled to try the case with a juror in the box to whom it had objected and who was incompetent to serve. The erroneous ruling of the judge as to the competency of the juror compels us to order a new trial in the appeal of the oil company.

*New Trial.*<sup>1</sup>

<sup>1</sup> As to the effect of relationship of a juror to a stockholder of a corporation which is a party to the action, see *Stone v. Monticello Constr. Co.*, 135 Ky. 659, 117 S. W. 369, 40 L. R. A. (n. s.), 978, 21 Ann. Cas. 640. See further *Moore v. Farmers' Mut. Ins. Assoc.*, 107 Ga. 199, 33 S. E. 70; *Walter v. Louisville Ry. Co.*, 150 Ky. 652, 150 S. W. 824, 43 L. R. A. (n. s.), 126. — Ed.

BLEVINS, by his next friend v. THE ERWIN COTTON  
MILLS.

SUPREME COURT OF NORTH CAROLINA. 1909.

[Reported 150 *North Carolina*, 493.]

ACTION to recover damages for personal injury, caused by alleged negligence of defendant company, tried before Jones, J., and a jury, at October Term, 1908, of DURHAM.

Plaintiff objected to a juror because he was an employee of defendant company; objection overruled; plaintiff excepted. The juror was then challenged peremptorily; the challenge was allowed.<sup>1</sup> . . .

HOKE, J., after stating the case: We have carefully considered the exceptions noted in the record, and find no reversible error to plaintiff's prejudice. It is very generally held that an employee is an incompetent juror for the trial of a cause involving the rights or interests of the employer, and the plaintiff's objection should have been sustained. *Railroad v. Mitchell*, 63 Ga. 173; *Railroad v. Mask*, 164 Miss. 738. But the juror was challenged peremptorily, and it does not appear that the plaintiff's rights were in any way prejudiced by this ruling of the court. We have uniformly held that this right of challenge is given to afford a party litigant fair opportunity to remove objectionable jurors, and was not intended to enable them to select a jury of his own choosing. In *State v. Gooch*, 94 N. C. 987, the doctrine is stated as follows: "The right to challenge jurors is not a right to select such as the prisoner may desire, but is only the right to take off objectionable jurors and to have a fair jury to decide the cause." . . .

The judgment for defendant is therefore affirmed.

*No error.*<sup>2</sup>

<sup>1</sup> A part of the statement of facts and a part of the opinion are omitted. — Ed.

<sup>2</sup> See *Stowell v. Standard Oil Co.*, 139 Mich. 18, 102 N. W. 227; *Burnett v. B. & M. R. R. Co.*, 16 Neb. 332, 20 N. W. 280. — Ed.

## DAVEY v. THE CITY OF JANESVILLE.

SUPREME COURT OF WISCONSIN. 1901.

[Reported 111 *Wisconsin*, 628.]

BARDEEN, J.<sup>1</sup> Several jurymen who were residents and taxpayers in the city of Janesville were asked whether the fact that they might be called upon to pay a part of any judgment recovered by plaintiff would influence their action in arriving at a verdict. They answered that it would not. Defendant's counsel argue that this kind of an examination might have a tendency to cause jurors to lean towards the plaintiff's side of the case, in order to prove that they were not affected by their slight financial interest in the result. At common law the authorities are uniform that taxpayers of a city, in an action against it, might be excluded from the jury *ex mero motu*, or upon challenge for this cause, on the ground that they might be responsible for a ratable proportion of whatever verdict might be rendered against the city, and to that extent pecuniarily interested in the result of the suit. Thompson & M., *Juries*, § 179. This rule has been changed by statute in most states, probably on the ground that the interest is so inconsiderable as not to be likely to influence individual action. We see no reason why a plaintiff, who is the most likely to be affected by the interest of the jurymen, may not make the inquiries mentioned, with a view of establishing a foundation for the exercise of the right of peremptory challenge, if for no other purpose. The fear that such examination would be likely to arouse a tendency to lean the other way is more imaginary than real. . . .

*By the Court.* — The judgment is affirmed.<sup>2</sup>

<sup>1</sup> The statement of facts and a part of the opinion are omitted. — Ed.

<sup>2</sup> As to what questions are improper as tending to prejudice jurors, see *Blair v. McCormack Constr. Co.*, 123 N. Y. App. Div. 30, 107 N. Y. Supp. 750, affirmed, 195 N. Y. 521, 88 N. E. 1115; *Putnam v. Pacific Monthly Co.* (Ore., 1913), 130 Pac. 986, 45 L. R. A. (n.s.), 338. See further *Maize v. Sewell*, 4 Blackf. (Ind.), 447; Thompson, *Trials*, 2d ed., secs. 102, 103.

For the effect of a juror's residence in a city or town which is a party, see *Hesketh v. Braddock*, 3 Burr. 1847; *Kentucky Wagon Mfg. Co. v. City of Louisville*, 97 Ky. 548, 31 S. W. 130; *Hildreth v. City of Troy*, 101 N. Y. 234, 4 N. E. 559, 54 Am. Rep. 686; and cases and statutes cited in Thompson, *Trials*, 2d ed., sec. 63. Compare *Boston v. Baldwin*, 139 Mass. 315, 1 N. E. 417 (member of city council a juror in case to which the city is a party). — Ed.



EASTMAN *v.* COMMISSIONERS OF BURKE COUNTY.

SUPREME COURT OF NORTH CAROLINA. 1896.

[Reported 119 *North Carolina*, 505.]

FAIRCLOTH, C. J.<sup>1</sup> This is an action for possession of a part of the court-house square in Burke county. The plaintiff made a motion to have the cause removed to another county, on the ground that the subject of the action is county property, and that every juror in the county was interested as a taxpayer.

The same principle was considered in *Johnson v. Rankin*, 70 N. C. 550, and the motion was overruled. No judge or juror can serve in an action in which he is interested, but the interest of a man because of his residence in a county or town is too remote and indirect. Such a rule would disqualify every judge or justice of the peace to try an action in the county or town in which he resided.

*Affirmed.*<sup>2</sup>

SPEAR *et al.* *v.* SPENCER.

SUPREME COURT OF IOWA. 1848.

[Reported 1 *G. Greene*, 534.]

KINNEY, J. This was an action of trespass, tried at the September term of Jones County district court, 1847. It appears from the bill of exceptions that upon the day preceding the trial, a criminal cause was tried, in which the plaintiffs in error were convicted for an assault with intent to commit a bodily injury. It also appears from the bill of exceptions that the action of trespass was based upon the same facts, involving in the issue the same transactions as those tried and determined in the criminal cause, upon which the defendants had been found guilty.

An objection was made to six of the jurors, by the defendants alleging their incompetency upon the ground that they were jurors in the trial upon the indictment, and had expressed through their verdict their opinion. These jurors were placed upon their *voir dire*, and being informed that the civil cause was in relation to the

<sup>1</sup> The statement of facts is omitted. — Ed.

<sup>2</sup> Compare *Wilson v. Wapello County*, 129 Ia. 77, 105 N. W. 363, 6 Ann. Chas. 958; *Big Sandy Ry. Co. v. Boyd County*, 125 Ky. 345, 101 S. W. 354; *Watson v. DeWitt County*, 19 Tex. Civ. App. 150, 46 S. W. 1061. — Ed.

same facts as the one which they had tried, said that they had not formed or expressed any opinion.

Whereupon the court annulled the objection to the jurors, and the cause was tried, and a verdict of guilty returned against the defendants.

The action of the court in overruling this objection is assigned for error.

The counsel for defendants in error insist that as the jurors brought themselves within the test, by stating under oath that they had not formed or expressed any opinion in the case, that they were competent jurors. This is a rule which has been universally adopted in our courts, the object of which is to satisfy the court that the jurors have neither formed nor expressed any opinion, and are, therefore, free from bias, feeling, or prejudice. While, therefore, we would not innovate upon this well-established practice, still we cannot but conclude that in this case there was no necessity for the court's resorting to this test, as it must have been apparent that the jurors could not thus free their minds from those feelings of prejudice and disfavor, which the testimony, arguments, and verdict of an exciting criminal cause must have produced.

If the six jurors were competent, then the entire panel that tried and convicted the same defendants in the criminal prosecution was a competent panel in the civil action depending upon the same facts and proof; and as the jury in a criminal cause must be satisfied beyond a reasonable doubt of the guilt of the defendants, before they are authorized to return a verdict of "Guilty," and as in a civil cause the preponderance of testimony forms the basis of the verdict, it appears to us that a verdict against the defendants in a civil cause, depending upon the same facts as those upon which they had been convicted upon on indictment, would be inevitable, providing both are tried by the same jury.

It should be a primary object with the court, in the administration of justice, to preserve the purity of the jury box, and, if possible, to prevent persons from sitting as jurors upon the rights and liberties of men, where prejudice, feeling, or preconceived opinions, are to influence a verdict, which ought always to be impartial and the legitimate result of law and evidence.

While the competency of jurors is left to the discretion of the court, it ought always, in order to give the parties the benefit of an impartial trial, to prevent those men from becoming jurors, who, it appears, have formed an opinion, or whose minds are corrupted with improper prejudice and feeling, although they may say upon

oath that they are free from these disabilities. Without this salutary check, the purity of jury trials cannot be preserved, nor the rights of parties properly maintained.

In the case before us, six of the jurors who had tried and convicted the defendants upon an indictment involving the same questions and facts, were permitted to sit as jurors, and as we think it was impossible for them not to have formed an opinion upon the same matter involved in the issue at law (although they may innocently have thought differently), yet we are fully satisfied that they were incompetent jurors, and that it should have been so ruled by the court.

*The judgment of the court below is reversed, and a venire de novo awarded.*<sup>1</sup>

### WILSON v. THE STATE.

COURT OF ERRORS AND APPEALS OF NEW JERSEY. 1897.

[Reported 60 *New Jersey Law*, 171.]

DAVID Wilson was convicted of murder in the first degree, in November, 1896, in the Morris county Oyer and Terminer and sentenced to be executed.<sup>2</sup> . . .

VAN SYCKEL, J. The grounds relied upon for the reversal of the judgment in this case are:

*First.* The refusal of the trial court to sustain challenges to jurors. . . .

The question in relation to the challenge of jurors is presented as follows:

"*Juror Peter Cook*, challenged to the favor, having been duly sworn, testified as follows:

"Direct examination by Mr. Quayle.

"*Q.* Where do you live?

"*A.* Budd's Lake.

"*Q.* Have you formed any opinion in this case?

"*A.* I have.

<sup>1</sup> Compare *People v. Mol*, 137 Mich. 692, 100 N. W. 913, 68 L. R. A. 871, 4 Ann. Cas. 960; *Hunt v. City of Columbia*, 122 Mo. App. 31, 97 S. W. 955.

As to how far a knowledge of the facts affects the competency of a juror, see *State v. Geier*, 111 Ia. 706, 83 N. W. 718; *Burlington & M. River R. R. Co. v. Beebe*, 14 Neb. 463, 16 N. W. 747; *State v. Stentz*, 30 Wash. 134, 63 L. R. A. 807. — Ed.

<sup>2</sup> A part of the statement of facts and a part of the opinion and the dissenting opinion of Garrison, J., are omitted. — Ed.

"Q. What is that opinion ?

"A. Well, my opinion is he ought to be hung, according to the papers — what I have seen in the papers.

"Q. Well, do you think that evidence could convince you to the contrary if produced here on the witness-stand ?

"A. Well, if they have got clean proof of it they might; then I might be convinced.

"Q. What do you think ?

"A. Well, if they have got evidence enough to prove he is not guilty, why, then, of course I will have to go according to the evidence; but in my own mind I possess an opinion, according to the papers, that he ought to be hung.

"Q. And you have already given expression to that, have you ? Would it take more than the ordinary amount of evidence, then, to convince you to the contrary ?

"A. Well, I don't know really; it would have to be quite strong evidence to convince me anyway.

"Q. Quite strong ?

"A. Yes.

"Q. Stronger than the ordinary amount of evidence ?

"A. Yes, sir.

"Q. Have you any prejudice on account of his color ?

"A. Not at all.

"Q. Or general appearance ?

"A. No shape or manner.

"Q. That's all.

"Cross-examination by the prosecutor.

"Q. If the evidence on the part of the state should fail to prove the case against him, as it has been stated from which your impression has been formed, would you still feel as you do ?

"A. Well, I don't know really how I could; if the state failed to prove him guilty, I could not fetch out a verdict that he was guilty.

"Q. Then you feel that you could consider the evidence that may be produced here and weigh it, and upon that evidence decide whether he is guilty or not ?

"A. Yes, sir.

"Q. And if the state fails to prove the case against him, you would not then feel that he should be convicted ?

"A. Oh, no; no, I could not.

"The Court — The challenge is overruled."

Since the trial of the case of *State v. Spencer*, it has been the accepted law of this state that it is not a ground of principal chal-



lenge to a juror that he has expressed an opinion on the matter to be tried, if it was not done through malice or ill-will.

In that case, reported in 1 Zab. 196, Chief Justice Hornblower says: "A declaration of opinion to disqualify a juror, therefore, must be such an one as implies malice or ill-will against the prisoner, thereby showing that the person challenged does not stand indifferent between the state and him."

This declaration was approved without any qualification by our Supreme Court, in an opinion delivered by Chief Justice Green, in *State v. Fox*, 1 Dutcher, 566.

This question was again raised in *Moschell v. State*, 24 Vroom, 498, and the rule adopted in the cases above cited was inflexibly adhered to.

We are of opinion that the practice in this respect, which has so long prevailed in our courts, is well founded and wise, and that no departure from it should be sanctioned.

The juror challenged in this case disclaimed malice or ill-will, and there is nothing in his examination which rendered him subject to a successful challenge, and it was therefore properly overruled.<sup>1</sup> . . .

*For affirmance* — DEPUE, GUMMERE, LUDLOW, VAN SYCKEL, DAYTON, HENDRICKSON, NIXON. 7.

*For reversal*<sup>2</sup> — THE CHANCELLOR, COLLINS, DIXON, GANNON, LIPPINCOTT. 5.

<sup>1</sup> See *State v. Willis*, 71 Conn. 293, 41 Atl. 820; *Commonwealth v. Webster*, 5 Cush. (Mass.), 295, 52 Am. Dec. 711; *Abbot v. People*, 86 N. Y. 460; *Scribner v. State*, 3 Okla. Crim. Rep. 601, 108 Pac. 422, 35 L. R. A. (N.S.), 985; *Commonwealth v. Crossmire*, 156 Pa. 304, 27 Atl. 40; *State v. Meaker*, 54 Vt. 112.

As to the necessity that an opinion be expressed or declared before it renders the juror disqualified on a challenge for principal cause, see *Boardman v. Wood*, 3 Vt. 570; *Thompson & Merriam*, Juries, sec. 206.

As to incompetency for bias, see *Chicago & Alton R. R. Co. v. Adler*, 56 Ill. 344; *Commonwealth v. Knapp*, 9 Pick. (Mass.), 496; *Theobald v. St. Louis Transit Co.*, 191 Mo. 395, 90 S. W. 314; *Chesapeake & Ohio Ry. Co. v. Smith*, 103 Va. 326, 49 S. E. 487. — Ed.

<sup>2</sup> The dissent was not based on the question of the competency of the juror. — Ed.

SEARLE *v.* ROMAN CATHOLIC BISHOP OF  
SPRINGFIELD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1909.

[Reported 203 *Massachusetts*, 493.]

KNOWLTON, C. J.<sup>1</sup>. . . Exception was taken by the defendant to the ruling of the judge at the request of the plaintiff, that no person of the Roman Catholic faith should sit as a juror in these cases. Under this ruling two jurors were excluded from the panel, one a resident of Northampton and the other a resident of South Hadley. The ruling was made on the ground that the defendant is the Roman Catholic Bishop of Springfield, a corporation sole under the St. 1898, c. 368, who holds the title to the real estate in trust for the Roman Catholic church, and that these excluded jurors have an interest in the suit analogous to that which taxpayers have in a suit against the city or town in which they reside. It is not contended and it could not successfully be contended that holding the same religious belief as one of the parties, or affiliation with him in the same church, would disqualify a person from sitting as a juror in his case. The application of such a doctrine would be unjust and impracticable. *Commonwealth v. Buzzell*, 16 Pick. 153. *Purple v. Horton*, 13 Wend. 1. *Barton v. Erickson*, 14 Neb. 164. *Smith v. Sisters of Good Shepherd*, 27 Ky. Law Rep. 1170.

The real estate held by the defendant is in the town of Easthampton, and it was bought as a site for a church edifice. The excluded jurors were not taxpayers in that town, and it may be assumed that they were not members of the parish that was expected to use the church. The ruling applied to all jurors of the Roman Catholic faith, without reference to their residence, or to any close affiliation with the local church. Has every person of the Roman Catholic faith in the diocese of the bishop of Springfield a pecuniary interest, of which the court can take notice, in every church owned by the defendant in every part of the diocese? We are of opinion that he has not. It does not appear, and we have no reason to suppose, that every Roman Catholic living in a remote part of the diocese can be affected pecuniarily by a small loss or gain of the bishop as owner, in connection with the erection of a Roman Catholic church in Easthampton.

Under the St. 1898, c. 368, the defendant's holding of property is "for the religious and charitable purposes of the Roman Catho-

<sup>1</sup> The statement of facts and a part of the opinion are omitted. — ED.

lic Church." In the R. L., c. 36, §§ 44-46, it is strongly implied that there is a difference in the trusts, and in the beneficiaries, among churches in different places, and that the members of a particular parish and those directly connected with the church therein have different pecuniary relations to the church there from those of the same faith who live in a different part of the same diocese. Upon the record before us this ruling of the judge appears to be wrong. See *Burdine v. Grand Lodge of Alabama*, 37 Ala. 478; *Delaware Lodge v. Allmon*, 1 Penn. (Del.), 160.

The remaining question is whether the error was prejudicial to the legal rights of the defendant. The manner of impaneling jurors is prescribed by the R. L., c. 176, § 25. The names of those summoned as jurors are written on ballots and placed in a box, and, after the ballots are shaken up, the clerk draws them one by one in succession until twelve are drawn. Apart from challenges, "the twelve men so drawn . . . shall be the jury to try the issue," etc. The order of the judge was a violation of the statutory provision, and of the defendant's right to have the excluded men sit as jurors unless challenged by the plaintiff.

The case was tried by other qualified jurors, and it is argued that the defendant was not injured by the order. Under the R. L., c. 176, § 32, no irregularity in the drawing, summoning, returning or impaneling of jurors is sufficient to set aside the verdict, unless the objecting party was injured thereby. In general it may be assumed that all duly qualified jurors, against whom there cannot be a successful challenge for cause, will consider and try a case properly. But a man may have affiliations and friendships, or prejudices and habits of thought which would be likely to lead him to look more favorably for the plaintiff, or less favorably for him, upon a case of a particular class, or upon one brought by a particular person or a member of a particular class of persons, than would the average juror, even though his peculiarities are not sufficiently pronounced to disqualify him for service. It is in reference to these peculiarities that the parties are given a limited number of peremptory challenges. While they have no direct right of selection, this right of peremptory challenge gives to each party a restricted opportunity for choice among qualified persons.<sup>1</sup> Anything which renders this statutory right of peremptory challenge materially less valuable is an injury to a party, within the meaning of the statute. We do not intimate that any juror would con-

<sup>1</sup> In R. L., c. 176, § 29, it is provided that "In a civil case each party shall be entitled to two such challenges."

sciously allow feelings of friendship or prejudice, or unusual and peculiar habits of thought, to affect his conduct in the jury room; much less that a party has a right to have the benefit of the peculiar views or special feelings of a particular juror in the trial of his case. But the right of peremptory challenge in the impaneling of jurors cannot be disregarded as of no value to the parties. In the case at bar, a class of persons qualified as jurors, whom the plaintiff thought in such relations of religious affiliation with the defendant that they would be likely to hear his defense in an attitude of special friendship, was withdrawn from the list of jurors. The order of the judge rejecting these men, at the request of the plaintiff, gave him at the outset an additional power of choice, and made his right of peremptory challenge relatively more valuable, while the defendant's similar right was made relatively less valuable. We are of opinion that this was an injury to the defendant which entitles him to a new trial. The number of persons summoned as jurors that belonged to this class does not appear. It only appears that the names of two of them happened to be drawn from the box.

Our decision seems to be in accordance with the weight of authority, although some of the cases depend upon local statutes. *Hildreth v. Troy*, 101 N. Y. 234. *Welch v. Tribune Publishing Co.*, 83 Mich. 661. *Seranton v. Gore*, 124 Penn. St. 595. *Montague v. Commonwealth*, 10 Gratt. 767. *Kunneen v. State*, 96 Ga. 406. *Bell v. State*, 115 Ala. 25. *Danzey v. State*, 126 Ala. 15.

We are aware that courts have often required pretty clear proof of injury before setting aside a verdict for a cause of this kind. *West v. Forrest*, 22 Mo. 344. *Southern Pacific Co. v. Rauh*, 49 Fed. Rep. 696. *Pittsburg, Cincinnati, Chicago & St. Louis Railroad v. Montgomery*, 152 Ind. 1, 23. *People v. Searcey*, 121 Cal. 1. *Tatum v. Young*, 1 Porter (Ala.), 298. *Abilene v. Hendricks*, 36 Kans. 196, 200. It is also generally held that an appellate court will not review an exercise of discretion, or a mere finding of fact of a trial judge, determining whether a person shall sit upon a jury. *Commonwealth v. Hayden*, 4 Gray, 18. *Grace v. Dempsey*, 75 Wis. 313. *People v. Searcey*, 121 Cal. 1, 3. *Commonwealth v. Moore*, 143 Mass. 136, and cases cited. Whether an error of law like that in the present case, if it arose only in determining the qualifications of a single juror, should be held so far to injure an objecting party as to require the verdict to be set aside, we do not find it necessary to determine; but when, as in the pres-



ent case, the ruling applies to a class of persons, we feel constrained to say that there was an injury of which the law should take notice. *Exceptions sustained.*<sup>1</sup>

### SECTION III.

*Right to Open and Close.*

MERCER *v.* WHALL.

QUEEN'S BENCH. 1845.

[Reported 5 *Queen's Bench Reports*, 447.]

COVENANT against the defendant, an attorney, for dismissing from his service the plaintiff, an article clerk. The defendant pleaded that the plaintiff had misconducted himself. The plaintiff replied, *de injuria*. On the trial, before Lord Denman, C. J., a question arose as to the right to begin; and his Lordship ruled that the plaintiff had that right, since it lay on him to prove some damage. There was a verdict for the plaintiff, damages 300*l.* The defendant obtained a rule *nisi* for a new trial on the ground, *inter alia*, of an improper ruling on the right to begin.<sup>2</sup>

DENMAN, C. J. The natural course would seem to be that the plaintiff should bring his own cause of complaint before the Court and jury, in every case where he has anything to prove either as to the fact necessary for his obtaining a verdict, or as to the amount of damage to which he conceives the proof of such facts may entitle him.

The law, however, has by some been supposed to differ from this course, and to require that the defendant, by admitting the cause of action stated on the record, and pleading only some affirmative fact which if proved will defeat the plaintiff's action, may entitle himself to open the proceeding at the trial, anticipating the plaintiff's statement of his injury, disparaging him and his ground of complaint, offering or not offering, at his own option, any proof of his defensive allegation, and, if he offers that proof, adapting it, not to plaintiff's case as established, but to that which he chooses to represent that the plaintiff's case will be.

<sup>1</sup> See *Reed v. Peacock*, 123 Mich. 244, 82 N. W. 53, 49 L. R. A. 423; *Hildreth v. City of Troy*, 101 N. Y. 234, 4 N. E. 559, 54 Am. Rep. 686. — Ed.

<sup>2</sup> The statement of facts is abridged and a part of the opinion is omitted. — Ed.

It appears expedient that the plaintiff should begin, in order that the judge, the jury, and the defendant himself, should know precisely how the claim is shaped. This disclosure may convince the defendant that the defence which he has pleaded cannot be established. On hearing the extent of the demand, the defendant may be induced at once to submit to it rather than persevere. Thus the affair reaches its natural and best conclusion. If this does not occur, the plaintiff, by bringing forward his case, points his attention to the proper object of the trial, and enables the defendant to meet it with a full understanding of its nature and character. If it were a presumption of law or if experience proved that the plaintiff's evidence must always occupy many hours, and that the defendant's could not last more than as many minutes, some advantage would be secured by postponing the plaintiff's case to that of the defendant. But, first, the direct contrary in both instances may be true; and, secondly, the time would only be saved by stopping the cause for the purpose of taking the verdict at the close of the defendant's proofs, if that verdict were in favour of the defendant. This has never been done or proposed: if it were suggested, the jury would be likely to say, on most occasions, that they could not form a satisfactory opinion on the effect of the defendant's proofs till they had heard the grievance on which the plaintiff founds his action. In no other case can any practical advantage be suggested as arising from this method of proceeding. Of the disadvantages that may result from it, one is the strong temptation to a defendant to abuse the privilege. If he well knows that the case can be proved against him, there may be skilful management in confessing it by his plea, and affirming something by way of defence which he knows to be untrue, for the mere purpose of beginning. Take one or two cases. Trespass: plea; leave and licence: the plaintiff wishes to shew that extensive damage has been done to his property for the purpose of wilful oppression. But the defendant affirms, and must begin. It is obviously necessary for him to state some case for the plaintiff, to shew that the supposed licence applies to it. He brings evidence to prove a licence. When the plaintiff's turn comes, he clearly shews that the licence set up cannot apply to the trespass complained of. The real trial now commences; and the whole time given to the defendant's statement and evidence in support of his affirmation has been thrown away. Action for criminal conversation: plea; that the plaintiff had deserted his wife: so the defendant is to begin, and possess the jury with an affecting detail of cruelty and infidelity.

He purchases this right only by admitting his adulterous intercourse, an admission which would seem to supply no very good reason for conferring any advantage upon him. He makes his attempt by calling some evidence: whether he fails or succeeds cannot be known till the whole case is closed; but the plaintiff brings forward his own complaint, the defendant's conduct, the extent of his injury, the just amount of damages, with the disadvantage of first struggling against the heavy charge with which he is loaded. Possibly the defendant makes no such attempt; but his affirmation on the record gives him the right to introduce the plaintiff's case by stating his infamy without proof, and by proving every circumstance of disparagement and degradation short of the fact which he has pleaded.

It is not wonderful that little authority should be found on this point. Very few *nisi prius* cases were formerly reported. What is called the right to begin was in many instances rather a burden than a benefit; and a general opinion prevailed that the course adopted by the presiding judge at the trial was not subject to revision in any other Court. But I can speak of my own impression arising from attendance at *nisi prius* as a barrister near thirty years, and corresponding, as far as I have observed, with the general opinion of the bar. I never doubted that the plaintiff was privileged and required to begin, whenever anything was to be proved by him. The simplicity and easy application of this mode of practice would recommend it to adoption if the question were new, and would raise a great probability that the common sense of old times had sanctioned it as a part of our system. It frequently occurred that, in an action of trespass, with plea of justification under a right, the defendant claimed to begin. He said: "I admit the trespass; and the burden of proving the defence rests on me." The answer constantly given was: "I the plaintiff have the right to begin, because I go for substantial damages. I claim to disprove your right in the first place, if I think proper, but at all events to possess the jury of the extent of the mischief you have done me." On such occasions the Judge took upon himself to decide whether the plaintiff really went for substantial damages. If he did, it was always assumed that he must begin. The Judge perhaps decided this matter without very adequate materials; but he would not have thought of doing so at all if the right depended on the issue as it appeared on the record. . . .

In ejectment, the defendant may entitle himself to begin, by admitting that the plaintiff must recover possession unless the

defendant can establish a certain fact in answer; and, if, in an action for damages, the damages are ascertained, and the plaintiff has a *primâ facie* case on which he must recover that known amount and no more unless the defendant proves what he has affirmed in pleading, here is a satisfactory ground for the defendant's proceeding at once to establish that fact. But, if the extent of damage is not ascertained, the plaintiff is the person to ascertain it, and his doing so will have the good effect of making even the defence, in a vast majority of cases, much more easily understood for all who are entrusted with the decision.

We do not deem it necessary to discuss the numerous cases recently reported from *nisi prius*; for they only prove the unsettled state of judicial opinion on this subject: but, for the reasons now given, we think that the plaintiff was entitled to begin on the present occasion. . . .

There is therefore no ground for a new trial; and the rule must be discharged.

*Rule discharged.*<sup>1</sup>

AYER v. AUSTIN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1828.

[Reported 6 *Pickering*, 225.]

TRESPASS against the sheriff of Middlesex for taking the plaintiff's timber.

The defendant pleaded the general issue, and filed a brief statement, wherein he averred that the timber was attached by one Hunnewell, his deputy, on divers writs against Edward and Henry Rogers, whose property at the time of the taking he alleged it to be, and so justified the taking, &c.

At the trial, before Wilde, J., the counsel for the defendant admitted that the timber was once the property of the plaintiff, and that it still remained so, unless there had been a sale to the Rogerses. Upon this admission the defendant was called upon to make his defence, and his counsel contended, that as the burden of proof was thrown upon him by the admission, his counsel was entitled to begin and also to close the case; but the judge ruled that the plaintiff's counsel was entitled to the close.<sup>2</sup> . . .

<sup>1</sup> See also *Brunswick & Western R. R. Co. v. Wiggins*, 113 Ga. 842, 39 S. E. 551, 61 L. R. A. 513; *Cunningham v. Gallagher*, 61 Wis. 170, 20 N. W. 925. — Ed.

<sup>2</sup> A part of the statement of facts is omitted. — Ed.



PARKER, C. J., delivered the opinion of the Court. On the point raised in this case, which is matter of practice only, we are all clear that the course of argument prescribed at the trial was right. The general rule is, that the plaintiff, who has the burden of proof, shall have the general reply or closing argument. There has been an exception in our practice, only where the defendant by his plea admits the whole cause of action stated in the declaration, and undertakes to remove or defeat it by the matter set up in his bar. The cases have usually been trespass, where the defendant acknowledges the act, and claims in his plea the soil and freehold in himself, or some one under whom he acts as a servant or by license; — slander, in which a justification only is pleaded — and debt on obligation, where the contract is admitted and some matter of defeasance or discharge is pleaded. There are other cases depending upon the same principle, that is, where, by the pleadings, nothing essential to the action is left for the plaintiff to prove, and where the finding of the issue for the defendant depends upon affirmative proof by him. In all such cases, however, if the defendant pleads the general issue also, the right of reply has been accorded to the plaintiff, even if on trial the defendant waives any proof on the part of the plaintiff to maintain that issue. This having been the uniform practice, according to the recollection of all of us, it is best to adhere to it, although in other cases, and in such as is before us, where the plaintiff was saved the trouble of proof to make out his case by admission of the necessary facts, the reason may be quite as strong for giving this privilege to the defendant. The right of closing a cause is not very essential to the procurement of a right verdict, if the judge who presides is cautious in summing up the evidence. If, as in a neighbouring state, the Court were mere silent spectators of forms without the right of charging the jury, the privilege of closing would be more worth contending for than with us, where the judge has the last word instead of the counsel. *Motion for new trial overruled.*<sup>1</sup>

<sup>1</sup> In Massachusetts the rule has been changed and the plaintiff is entitled to open and close in all cases. See *Dorr v. Tremont Nat. Bank*, 128 Mass. 349. — Ed.

## PONTIFEX and Others v. JOLLY.

NISI PRIUS. 1839.

[Reported 9 *Carrington & Payne*, 202.]

ASSUMPSIT on a bill of exchange, dated the 16th of February, 1839, drawn by James Jolly on the defendant for £25, payable three months after date, and by James Jolly indorsed to the plaintiff. Pleas, 1st, a denial of the acceptance; 2nd, a denial of the indorsement; 3rd, payment before the bringing of the action; 4th, that the bill was given as a security for the payment of a sum of 26*l.* 5*s.* due from James Jolly to the plaintiffs, and that that sum had been paid to the plaintiffs before the bringing of the action. Replication, to the 3rd and 4th pleas, *de injuriâ*.

*R. V. Richards*, for the defendant. — I will admit the acceptance and the indorsement, and open my case on the 3rd and 4th pleas.

*Kelly*, for the plaintiffs. — The defendant admitting that the plaintiffs must have a verdict on the first two issues does not deprive me of my right to begin.

*R. V. Richards*. — I submit that this is like the case of an ejectment by heir against devisee; where, if the defendant admits the heir's *primâ facie* title, he is entitled to begin.

ALDERSON, B. — I think Mr. Richards now admitting the acceptance and indorsement will not entitle him to begin. On this record the plaintiff is entitled to begin.

*Kelly*, for the plaintiffs, opened his case.

*Verdict for the plaintiffs.*<sup>1</sup>

## MURRAY v. NEW YORK LIFE INSURANCE COMPANY.

COURT OF APPEALS OF NEW YORK. 1881.

[Reported 85 *New York*, 236.]

MILLER, J.<sup>2</sup> The right of a party holding the affirmative upon an issue of fact upon trial to open and close the evidence, and upon the final submission of the case to the jury to reply in summing up

<sup>1</sup> See *Price v. Seaward*, Car. & M. 23; *Lake Ontario Nat. Bank v. Judson*, 122 N. Y. 278, 25 N. E. 367.

As to the effect of an amendment of the pleadings, see *Gardner v. Meeker*, 169 Ill. 40, 48 N. E. 307. — Ed.

<sup>2</sup> The statement of facts is omitted. — Ed.

the case is too well settled to admit of any question. And when such right is denied by the judge upon the trial, such denial furnishes ground for exception, which is the subject of review upon appeal. *Millerd v. Thorn*, 56 N. Y. 402.<sup>1</sup> The defendant in this case clearly held the affirmative of the issue upon trial, and the judge erred in refusing to allow the defendant to open and close the case in accordance with such right. The complaint was upon two policies of insurance, copies of which were attached, each of which contained a provision as follows, that: "If the person whose life is hereby insured shall . . . die in, or in consequence of a duel, or of the violation of the laws of any nation, State or province, . . . then, and in every such case, this policy shall be null and void."

It alleged among other things that the death of the insured was not caused by the breaking of any of the conditions and agreements in either of the policies. This allegation was not required, and all that was essential to make out a cause of action was a statement of the contract, the death of the assured, and the failure to pay as provided. The insertion of an unnecessary allegation in the complaint, which the plaintiff was not required to aver or to prove in order to establish his case, could not and did not deprive the defendant of his right to the affirmative, if such right actually existed. As the allegation referred to was not properly there for the purpose of making out a good cause of action, the complaint must be regarded as if it contained no such averment. The answer of the defendant denied this allegation of the complaint, admits the death, and sets up that the insured died in consequence of a violation by him of the laws of the State of New York, and in consequence of an unlawful assault committed by him upon one Robert H. Berdell. It also admits that the defendant insured the life of Wisner Murray by two policies of insurance, copies of which were annexed to the complaint, and begs leave to refer to the originals thereof when they shall be produced. This allegation we think was not a

<sup>1</sup> For cases showing conflicting opinions as to whether the deprivation of the right to begin is error, see *Thompson*, *Trials*, 2d ed., sec. 226; 38 Cyc. 1309.

In *Lancaster v. Collins*, 115 U. S. 222, 29 L. ed. 373, 6 S. Ct. 33, the court, Blatchford, J., said: "It is also assigned for error, that the court refused to permit the counsel for the plaintiff to make the closing argument to the jury, the contention on the part of the plaintiff being that the affirmative was with him. But this is purely a question of practice, to be reviewed only by a motion for a new trial in the trial court, and is not the proper subject of a bill of exceptions or of a writ of error, because it does not affect the merits of the controversy." *Day v. Woodworth*, 13 How. 363, 370." — Ed.

denial of the policies and did not require their proof. In fact it admitted their existence and validity, simply asking that the originals instead of copies be taken as the contract, which was all the plaintiff claimed.

The only facts which were really to be tried were those averred in the affirmative defense set up that Wisner Murray died in consequence of a violation of the laws of the State. If the defendant introduced no such evidence by the answer which admitted the plaintiff's cause of action she was entitled to recover the amount of the policies.

The defendant had alleged a breach, and unless it was proved no defense was made out, and the plaintiff was not called upon to disprove what had not been established by evidence. No presumption could arise in favor of the defendant without proof that the assured died from a violation of law, and unless this was established the plaintiff would have been entitled to a judgment upon the pleadings. The rule is well established that in an action upon a policy of insurance when the answer admits the issuing of the policy and the allegations in the complaint, and alleges a breach of its conditions, the burden of proof is upon the defendant, and the plaintiff is entitled to recover unless the defendant satisfies the court or jury, by a preponderance of evidence, that the conditions had been broken. *Jones v. Brooklyn Life Ins. Co.*, 61 N. Y. 79; *Van Valkenburgh v. American Pop. Life Ins. Co.*, 70 id. 605; *Elwell v. Chamberlin*, 31 id. 611. There is no ground for claiming that the answer did not admit all that was essential to entitle the plaintiff to a judgment, and there is no such denial of any material fact in the complaint as required any proof on the part of the plaintiff to maintain the action. Merely asking leave to refer to the original policies when produced related to the accuracy of the copies, was not a denial of their terms and conditions, and presented no issue for trial. The plaintiff, we think, would have been entitled to a judgment without their production, and upon the failure of the defendant to prove his affirmative defense that the deceased died in, or in consequence of a violation of law, and after the court had held that the plaintiff was entitled to the affirmative, such testimony could have no effect in determining the right of the defendant to the affirmation.

As for the error stated the judgment must be reversed, and as a new trial may present a different state of facts, it is not necessary to consider the other questions raised upon the trial.



The judgment should be reversed and new trial granted, with costs to abide the event.

All concur.

*Judgment reversed.*<sup>1</sup>

In *HUNTINGTON v. CONKEY*, 33 Barb. (N. Y.), 218, p. 228, the court (E. D. Smith, J.) thus summarized the law on the right to begin:

“1st. The plaintiff in all cases where the damages are unliquidated, has the right to open the case to the jury and have the reply.

“2d. Whenever the plaintiff has anything to prove, on the question of damages, or otherwise, he has the right to begin.

“3d. In other cases, where the damages are liquidated or depend upon mere calculation — as the casting of interest — the party holding the *affirmative* of the issue has the right to begin.

“4th. The affirmative of the issue, in such cases, means the affirmative in *substance*, and not in form, and upon the whole record.

“5th. That the denial of the right to begin, to the party entitled to it and claiming it at the proper time, is error for which a new trial will be granted; unless the court can see, clearly, that no injury or injustice resulted from the erroneous decision.”

#### SECTION IV.

##### *Demurrer to Evidence.*

MIDDLETON *v.* BAKER.

QUEEN'S BENCH. 1600.

[Reported 2 *Croke, Elizabeth*, 752.]

**EJECTIONE FIRMAE.** — It was held by all the Court upon evidence to a jury, that if the plaintiff in an ejectione firmae, or other action, gives in evidence any matter in writing or record, or a sentence in the spiritual court (as it was in this case), and the defendant offers to demur thereupon, the plaintiff ought to join in the demurrer, or waive the evidence, because the defendant shall not be compelled to put a matter of difficulty to lay gents, and because there cannot be any variance of a matter in writing: but if either party offers to demur upon any evidence given by

<sup>1</sup> See *Heilbronn v. Herzog*, 165 N. Y. 98, 58 N. E. 759.

Conversely, when the plea or answer is affirmative in form but negative in substance, the plaintiff has the right to open and close. *Rahn v. Deig*, 121 Ind. 283, 23 N. E. 141. — Ed.

witness, the other, unless he pleaseth, shall not be compelled to join; because the credit of the testimony is to be examined by a jury, and the evidence is certain, and may be enforced more or less, but both parties may agree to join in demurrer upon such evidence. And in the queen's case, the other party may not demur upon evidence shewn in writing or record for the queen, unless the queen's counsel will thereto assent; but the Court in such case shall charge the jury to find the matter special, as appears 34 Hen. 8. Dyer, 53. But this is by prerogative.

## SKINNER MANUFACTURING COMPANY v. WRIGHT.

SUPREME COURT OF FLORIDA. 1906.

[Reported 51 *Florida*, 324.]

SHACKLEFORD, C. J. This is an action of ejectment instituted by the plaintiff in error as plaintiff against the defendant in error as defendant in the Circuit Court for Santa Rosa County to recover the possession of a certain parcel of land and for mesne profits. At the close of all the plaintiff's evidence the defendant filed what purported to be a demurrer thereto, the plaintiff objected to joining therein but the court made an order requiring it to do so, which the plaintiff then did, and after argument by the respective counsel the court made an order sustaining the demurrer to the evidence and rendered a judgment in favor of the defendant. To this judgment the plaintiff took a writ of error returnable to the present term. Three errors are assigned, based respectively upon the order requiring the plaintiff to join in the demurrer to the evidence, the order sustaining the demurrer and the order overruling the plaintiff's motion for a new trial.

The demurrer in question was as follows:

"The defendant demurs to the evidence in this case and for ground of demurrer says that it is insufficient to warrant the finding of a verdict or the rendition of a judgment in favor of the plaintiff."

We are of the opinion that all the errors are well assigned.

It is settled law in this court that the party demurring to the evidence must set forth on the record all of the evidence intended to be admitted thereby, and, if this is not done, the opposing party cannot be required to join therein, and, even if he should join therein voluntarily, the court can give no judgment upon the demurrer, but must award a *venire de novo*. See *Higgs v. Shehee*, 4

Fla. 382; *Morris v. McKinnon*, 12 Fla. 552; *Hinote v. Simpson & Co.*, 17 Fla. 444; *Hanover Fire Insurance Co. v. Lewis*, 23 Fla. 193, 1 South. Rep. 863; *Duncan v. State*, 29 Fla. 439, 10 South. Rep. 815; *Wilkinson v. Pensacola & Atlantic R. R. Co.*, 35 Fla. 82, 17 South. Rep. 71; *Fee v. Florida Sugar Manufacturing Company*, 36 Fla. 612, 18 South. Rep. 853; *Holland v. State*, 39 Fla. 178, 22 South. Rep. 298; *Ingram v. Jacksonville St. R. R. Co.*, 43 Fla. 324, 30 South. Rep. 800; *Lowe v. State*, 44 Fla. 449, 32 South. Rep. 956, S. C. 103 Amer. St. Rep. 449; *Mugge v. Jackson*, 50 Fla. 235, 39 South. Rep. 157; *Atlantic Coast Line R. R. Co. v. Dexter*, 50 Fla. 180, 39 South. Rep. 634. Also see *Gould's Pleading* (5th ed.) 446 *et seq.*; *Gibson and Johnson v. Hunter*, 2 H. Blackstone, 187, text 205 *et seq.*, 6 Ency. of Pl. & Pr. 446 *et seq.*

None of the evidence in the instant case, which was partly documentary and partly parol, was reduced to writing, and no facts were admitted or stated on the record by the demurrer.

Further discussion is unnecessary. The judgment must be reversed, and it is so ordered, at the cost of the defendant in error.<sup>1</sup>

COCKRELL and WHITFIELD, JJ., concur.

TAYLOR AND HOCKER, JJ., concur in the opinion.

PARKHILL, J., disqualified.

<sup>1</sup> In the leading case of *Gibson v. Hunter*, 2 H. Bl. 187, Lord Chief Justice Eyre said:

"All our books agree, that if a matter of record, or other matter in writing, be offered in evidence in maintenance of an issue joined between the parties, the adverse party may insist upon the jury being discharged from giving a verdict, by demurring to the evidence, and obliging the party offering the evidence to join in demurrer. He cannot refuse to join in demurrer, he must join, or waive the evidence. Our books also agree, that if parol evidence be offered, and the adverse party demurs, he who offers the evidence may join in demurrer if he will. We are therefore thus far advanced, that the demurrer to evidence is not necessarily confined to written evidence. The language of our books is very indistinct upon the question, Whether the party offering parol evidence should be obliged to join in demurrer. Why is he obliged to join in demurrer, when the evidence which he has offered is in writing? The reason is given in Croke's report of Baker's case, because, says the book, "there cannot be any variance of matter in writing." Parol evidence is sometimes certain, and no more admitting of any variance than a matter in writing, but it is also often loose and indeterminate, often circumstantial. The reason for obliging the party offering evidence in writing, to join in demurrer, applies to the first sort of parol evidence, but it does not apply to parol evidence which is loose and indeterminate, which may be urged with more or less effect to a jury, and least of all will it apply to evidence of circumstances, which evidence is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of the existence of other facts. And yet if there can be

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RAILWAY COMPANY *v.* TEMPLETON.

SUPREME COURT OF TEXAS. 1894.

[Reported 87 *Texas*, 42.]

BROWN, A. J.<sup>1</sup> Defendant in error, plaintiff below, brought this suit by petition filed August 1, 1891, in the District Court for the Forty-fifth Judicial District of Bexar County, to recover \$15,000 damages, alleged to have been sustained by him on or about August 20, 1890, at San Antonio, by reason of injuries received, while in the service of appellant and in the discharge of his duties as switchman, in attempting to mount a flat car on which was a defective brake, causing him to be thrown from the car, his right leg broken, and thereby made much shorter than the other, and rendering him a cripple for life, unable to perform manual labor. From the injury he charges that he suffered great physical pain and mental anguish.

Defendant answered by general demurrer, general denial, and the plea that plaintiff's injury was caused by his own carelessness or that of his fellow servants; and also by special exception to plaintiff's first amended original petition, to the effect that it did not show wherein or how the brake alleged to have caused the accident was defective.

There was a trial by jury. The plaintiff having closed his evidence, the defendant demurred thereto; upon which plaintiff joined issue, and the court overruled the demurrer and instructed the jury to find for the plaintiff the actual damages by him sustained, if any, as the only question left for their determination. There was a verdict and judgment in favor of plaintiff for \$4600. Defendant made its motion for a new trial, which being overruled, it excepted thereto and in open court gave notice of appeal; and

no demurrer in such cases, there will be no consistency in the doctrine of demurrers to evidence, by which the application of the law to the fact on an issue is meant to be withdrawn from a jury, and transferred to the Judges. If the party who demurs will admit the evidence [existence?] of the fact, the evidence of which fact is loose and indeterminate, or in the case of circumstantial evidence, if he will admit the existence of the fact, which the circumstances offered in evidence conduce to prove, there will then be no more variance in this parol evidence, than in a matter in writing, and the reasons for compelling the party who offers the evidence to join in demurrer, will then apply, and the doctrine of demurrers to evidence will be uniform and consistent." — Ed.

<sup>1</sup> A part of the opinion is omitted. — Ed.



thereafter perfected its appeal by filing a *supersedeas* bond and an assignment of errors.

The Court of Civil Appeals affirmed the judgment of the District Court. . . .

The defendant having demurred to the evidence, and the plaintiff having joined in it, the case was as to the facts and the right of plaintiff to recover withdrawn from the jury, and must be decided by the court. *Booth v. Cotton*, 13 Texas, 362; *Tierney v. Frazier*, 57 Texas, 443; *Thornton v. Bank*, 3 Pet. 40; *Obaugh v. Finn*, 4 Ark. 110; 1 Tidd's Prac. 575.

If the damages claimed by plaintiff were liquidated, the court might decide the entire case, for in that event there would be no issue to submit to the jury. But when, as in this case, the damages claimed are unliquidated, that question must be submitted to a jury to ascertain the amount. *Ins. Co. v. Lewis*, 1 So. Rep. 863; *Boyd v. Gilchrist*, 15 Ala. 856; *Young v. Foster*, 7 Port. (Ala.), 420; 1 Tidd's Prac. 575; 2 Id. 866.

When a demurrer to evidence has been presented and joined in by the opposite party, the court may submit the case to the jury to ascertain the damages before deciding upon the demurrer, and hold the verdict subject to decision on the demurrer. Or if the demurrer be decided before the jury then impaneled has been discharged, the court may submit the question of damages to the jury that heard the evidence. Or the court may, upon presentation of the demurrer, discharge the jury, and in case it be overruled impanel a new jury to assess the damages. 2 Tidd's Prac. 866; *Ins. Co. v. Lewis*, 1 So. Rep. 863; *Obaugh v. Finn*, 4 Ark. 110; *Young v. Foster*, 7 Port. (Ala.), 420; *Boyd v. Gilchrist*, 15 Ala. 856; *Humphreys v. West*, 3 Rand. 516.

It is the better practice, we think, to submit the question of damages to the jury that has heard the evidence, either before or after decision on the demurrer, by which delay and cost would be saved for the parties to the action. Whether it be submitted before or after the decision upon the demurrer cannot be of importance nor work injury to either party. It was not error to submit the issue as to the amount of damages to the jury then impaneled, after the demurrer had been overruled.

Plaintiff in error claims that the court, after overruling its demurrer to the evidence, should have submitted the case to the jury on the evidence as to the right of plaintiff to recover. This would be a most extraordinary result of a demurrer to evidence. By it defendant would, under that practice (if it were the practice in any

court), withdraw the case from the jury as to the rights of the plaintiff, and in case the decision was favorable to the defendant, the plaintiff would be deprived of a trial by jury at the election of the defendant; but in case the court to which defendant appealed should decide against it, then it must be allowed that trial which it sought to avoid by the demurrer. It would have been error to have done what plaintiff in error claims the court should have done. It would have been contrary to the law, against reason, and against the right. . . .

The judgments of the District Court and the Court of Civil Appeals are affirmed. *Affirmed.*

## SOUTHERN RY. CO. *v.* TYREE & ADMINISTRATOR.

SUPREME COURT OF APPEALS OF VIRGINIA. 1912.

[Reported 114 *Virginia*, 318.]

HARRISON, J.,<sup>1</sup> delivered the opinion of the court.

This suit was brought to recover damages for the alleged negligent killing of the plaintiff's intestate by the defendant railway company. There was a demurrer to the evidence by the defendant, which was overruled, and judgment was given the plaintiff for the damages ascertained by the jury. This action of the circuit court is brought under review by the present writ of error. . . .

It is unnecessary to review the evidence adduced in this case to sustain the judgment complained of. It is sufficient to say that if the case had gone to the jury they might readily and reasonably have found that the plaintiff's intestate lost his life without fault on his part, and solely as a result of the negligent operation of its passenger train by the defendant company. It is well settled that if the jury might find the defendant guilty of negligence and the deceased free from contributory negligence, the court must so find on a demurrer to the evidence. *Bass v. N. & W. Ry. Co.*, 100 Va. 8, 40 S. E. 100; *C. & O. Ry. Co. v. Hoffman*, 109 Va. 44, 63 S. E. 432. . . .

Upon due consideration of the whole case, the judgment must be affirmed. *Affirmed.*<sup>2</sup>

<sup>1</sup> The statement of facts and a part of the opinion are omitted. — ED.

<sup>2</sup> See *Cocksedge v. Fanshaw*, Doug. 118, 129. — ED.

## HOPKINS v. RAILROAD.

SUPREME COURT OF TENNESSEE. 1896.

[Reported 96 *Tennessee*, 409.]

McALISTER, J.<sup>1</sup> The only question presented for determination upon the record is whether the practice of demurring to the evidence is sanctioned by the Constitution and laws of this State. The suit was brought by W. D. Hopkins, Administrator, to recover damages for the unlawful killing of his son, W. O. Hopkins. . . .

It appears from the record that at the conclusion of the plaintiff's testimony before the jury, counsel for defendant company interposed a written demurrer to the evidence, as follows, to wit: "The defendant comes and demurs to the evidence of plaintiff, and offers to admit of record that the following testimony and proof introduced by the plaintiff (setting out all the testimony introduced by plaintiff) is true, and further admits as true all proper and legal deductions and inferences therefrom in law. The defendant offers to admit that the facts so stated are the facts in the case, and were proven entirely by plaintiff and his witnesses, and does now aver that the facts so stated present no ground for a recovery against it under the pleadings in this cause, and this it is ready to verify. Wherefore, defendant prays the Court to allow this demurrer, and direct plaintiff to join therein; and judgment of the Court accordingly; and that plaintiff may be barred against having or maintaining his action against it, or further prosecuting the same.

"EAST AND FOGG,

"C. D. PORTER,

"J. D. B. DeBOW,

"Attorneys."

It will be observed that the demurrer in this cause was in writing, and set out in full the plaintiff's evidence, which is in accordance with the established practice in such cases.

Counsel for plaintiff moved to dismiss the demurrer, because unknown to the forms or practice of the law, and because insufficient, which motion was by the Court overruled. Thereupon, plaintiff joined issue upon the demurrer. Upon argument of coun-

<sup>1</sup> A part of the opinion containing a statement of the pleadings and evidence on which the court decided that the plaintiff had failed to show any liability on the part of the defendant, and a full citation of authorities, is omitted. — Ed.

sel and consideration by the Court the demurrer was sustained, and the suit dismissed. Plaintiff appealed, and has assigned errors.

The first assignment is that the trial Judge erred in allowing defendant to file a demurrer to the evidence sustaining the same, and dismissing the suit. It is insisted this action of the Court violates Article 1, Section 6 of the Constitution of the State, which provides that the right of trial by jury shall remain inviolate, etc.; and also Article 6, Section 9, which ordains: "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." . . .

We have seen from the authorities that the only province of the jury is to settle disputed questions of fact, while the office of the demurrer to the evidence is to admit the facts and invoke the application of the law by the Court. Is this practice in any sense an invasion of the constitutional guaranty "that the right of trial by jury shall remain inviolate," or is it subversive of the other provision "that judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law?" We do not so understand it. It is not so understood in other States of the Union with similar constitutional provisions. . . .

It will be perceived, moreover, that in every State of the Union the Judge is allowed to withdraw a case from the jury whenever there is a destitution of any competent, relevant, and material evidence to support the issue, and this authority is exercised, either by directing a verdict sustaining a demurrer to the evidence or enforcing a compulsory nonsuit, as the practice may prevail in the particular State. This fact is incontestable, and is abundantly shown in the overflow of cases already cited.

But it is argued by counsel for plaintiff in error that, whatever may be the practice in other States of the Union, the adjudications of this Court are against either form of practice, and necessarily so, since the Constitution of Tennessee not only secures the right of trial by jury, but further declares that "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." As already seen, the first clause in respect of the trial by jury, is found in the Constitution of all the States in one form or another, but the latter clause is found in the organic law of only five States. We do not think the latter clause adds anything to the prohibition contained in the first clause. The right of trial by jury, *ex vi termini*, means that Judges shall not charge juries with respect to matters of fact, but the settlement of all disputed facts shall be left exclusive to their province. This



Court in the case of *Ivey v. Hodges*, 4 Hum. 155, stated that the object of this provision of our Constitution was "to put a stop to the practice of summing up as it was and is yet practised in the Courts of Great Britain, etc., which consists in telling the jury not what was deposed to, but what was proved." In other words, the Court held that where there is a conflict in the testimony, the Judge may state the testimony, but is prohibited from declaring what facts are proved.

In the case of *Catlett v. Railway*, 57 Ark. 461, a similar provision of the Constitution of Arkansas was drawn in question as late as 1893. The Court said: "This provision shears the Judge of a part of his magisterial functions, but it confers no new power upon the jury. It was the jury's province, before this provision was ordained, to pass only upon questions of fact about which there was some real conflict in the testimony, or where more than one inference could reasonably be drawn from the evidence. The Constitution has not altered their province. It commands the Judge to permit them to arrive at their conclusion without any suggestion from him as to his opinion about the facts. As Judge Battle expressed it, in *Sharp v. State*, 51 Ark. 151: 'The manifest object of this prohibition was to give the parties to the trial the full benefit of the judgment of the jury as to facts, unbiased and unaffected by the opinion of the Judges. If there is no evidence to sustain an issue of fact, the Judge only declares the law when he tells the jury so.' The legal sufficiency of proof and the moral weight of legally sufficient proof are very distinct in legal idea. The first lies within the province of the Court, the last within the province of the jury." *Wheeler v. Schroeder*, 4 R. I. 383.

It will be found that the practice in the five States whose Constitutions embody this additional clause sanction either the compulsory nonsuit or the right of the Judge to direct a verdict, in either case confessedly a more radical procedure than the demurrer to the evidence. . . .

In the present record we are confronted with a perfectly plain case, in which no liability is established against the defendant upon the facts, or upon any reasonable or legitimate inference that may be made upon such facts. The law of every case, in whatever form presented, belongs to the Court. It is not only the prerogative of the Judge, but a solemn duty to declare it.

The defendant in this case is entitled to the judgment of the law, upon the undisputed facts found in the record. Our duty is imperative, and, being of opinion that in no view of the facts shown

in evidence is any liability made out against the defendant company, we affirm the judgment of the Circuit Court.<sup>1</sup>

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## SECTION V.

### *Voluntary Nonsuit or Dismissal.*

[Smith, *Action at Law* (2d ed.), pp. 115-117.]

WITH regard to a *nonsuit*,—the word is derived from the Latin *non sequitur*, or, more nearly, from the French *ne suit pas*, because the plaintiff does not follow up his suit to its legitimate conclusion; for, in the ancient times, before the jury gave their verdict, the plaintiff was called upon to hear it, in order that, if it proved adverse to him, he might be held answerable for the fine which was in those days levied upon an unsuccessful plaintiff. If he did not appear when thus called on, he was *nonsuited*, that is, adjudged to have deserted his action, and the court gave judgment against him for his default. And hence proceeds the ceremony which takes place, even at this day, of *calling the plaintiff* to come into the court when about to be nonsuited, and warning him, that he will lose his writ of *nisi prius*, that is, that he will lose the benefit of the jury process by which he has convened the jury who are now about to become superfluous in consequence of his default in not appearing. Another consequence of the ancient practice is, that a plaintiff cannot be nonsuited against his will; for a default is, in the nature of things, voluntary, and, when he is called on to appear, he may, if he think fit, make answer by his counsel, and, if he do, there can be no nonsuit; and, although it is usual, and, certainly, highly proper, for the plaintiff's counsel to yield to the opinion of the judge, when the latter intimates that his case is not made out, and that he ought to suffer a nonsuit, still, there have been instances, in which the plaintiff's counsel have persisted in appearing, and have even gained a verdict by their pertinacity. But it is very dangerous to resist the judge when he is of opinion that there ought to be a *nonsuit*, for, if the plaintiff disregard his intimation, he is certain to

<sup>1</sup> On the general subject of demurrers to evidence, see *Gibson v. Hunter*, 2 H. Bl. 187; *Fowle v. Common Council of Alexandria*, 11 Wheat. (U.S.), 320; *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 388-392, 409-418, 57 L. ed. 879, 33 S. Ct. 523; *Copeland v. New England Insurance Co.*, 22 Pick. (Mass.), 135; *Ware v. McQuillan*, 54 Miss. 703; *Colegrove v. N. Y. & N. H. R. R. Co.*, 20 N. Y. 492. And see 2 Tidd, *Practice*, 9th ed., 865; Thayer, *Preliminary Treatise on Evidence at the Common Law*, 235-239; Thayer, *Cases on Evidence*, 2d ed., 201-238. — ED.

direct the jury to find a verdict for the defendant, and though it is true that the plaintiff, whether he submit to a nonsuit or have a verdict found against him, must equally pay costs to the defendant, still there is this great practical difference between a verdict for the defendant and a nonsuit, namely, that the former has the effect of forever barring and determining his right of action, whereas, after the latter, he may bring a fresh action, and, if he come prepared with better evidence, may perhaps succeed in it.

### TEMPLETON & McKEE v. WOLF.

SUPREME COURT OF MISSOURI. 1853.

[Reported 19 *Missouri*, 101.]

GAMBLE, J. In this case, the court having given certain instructions to the jury, after the evidence was closed, the plaintiffs asked that they might be allowed to take a nonsuit, but the court refused to permit it, and a verdict and judgment were given for the defendant.

The statutes of this state have always recognized the right of a plaintiff to take a nonsuit, and have limited its exercise to the time previous to the retiring of the jury to consider their verdict. This practice is not affected by the code, being entirely consistent with it.

*The judgment is reversed, and the cause remanded, the other judges concurring.*<sup>1</sup>

### FOX v. THE STAR NEWSPAPER CO., LIMITED.

HOUSE OF LORDS. 1899.

[Reported (1900) *Appeal Cases*, 19.]

At the trial of this action for libel before Lord Russell of Killowen, C. J., and a special jury the plaintiff through his counsel elected to offer no evidence and claimed to be nonsuited. The Lord Chief Justice ruled that there must be a verdict for the defendants; the jury found a verdict accordingly and judgment was entered for the defendants.

<sup>1</sup> See *Parks v. Southern Ry. Co.*, 74 C. C. A. 414, 143 Fed. 276; *Moore-Mansfield Co. v. Marion, etc., Co.*, 52 Ind. App. 548, 101 N. E. 15; *Shaw v. Boland*, 15 Gray (Mass.), 571; *Carpenter & Sons Co. v. New York, etc., R. R.*, 184 Mass. 98, 68 N. E. 28; *Lawyers' Co-op. Pub. Co. v. Gordon*, 173 Mo. 139, 73 S. W. 155; *Bee Bldg. Co. v. Dalton*, 68 Neb. 38, 93 N. W. 930, 4 Ann. Cas. 508. — Ed.

An application to set aside the verdict and judgment was dismissed by the Court of Appeal (A. L. Smith, Chitty, and Collins, L. JJ.) with costs.

This appeal was brought by the plaintiff. . . .

Dec. 15. EARL OF HALSBURY, L. C. My Lords, this was an action for libel. After the jury had been sworn and the pleadings opened, the plaintiff claimed to be nonsuited; the Lord Chief Justice held that he was not entitled to be nonsuited, and directed a verdict for the defendants.

The sole question on this appeal is whether the old system by which a plaintiff at his own election could lose his writ, as it was said, and at his election bring another action for the same cause, is still a system which exists in our law. I am very clearly of opinion that it does not.

Our whole system has been changed, and I think the reason why the word "nonsuit" itself is not now to be found in the rules is that it was determined that the power of a plaintiff at the common law to claim a nonsuit, or the plaintiff in equity to dismiss his bill at his own option, should no longer be permitted, and it is probable that the word "discontinuance" was supposed to apply to both forms of procedure both at common law and in equity. Accordingly by Order xxvi., r. 1,<sup>1</sup> the only mode by which a plaintiff can submit to defeat is under that Order, unless he allows the proceedings to go on until the verdict is recorded against him.

The word "discontinuance" no doubt had, under a former system, the more limited application, and the old system of nonsuit is manifestly no longer capable of being reconciled with the new procedure either in form or substance. The substance is that when it once comes into court, and when the plaintiff offers no support to his action, there must be a verdict for the defendant. That is the course pursued by the Lord Chief Justice. I think it was entirely right, and I move your Lordships that this appeal be dismissed with costs.

LORDS MACNAGHTEN, MORRIS, and SHAND concurred.

*Order appealed from affirmed and appeal dismissed with costs.*

<sup>1</sup> Order XXVI, rule 1, provides: "The plaintiff may, at any time before receipt of the defendant's defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue his action against all or any of the defendants or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay such defendant's costs of the action, or if the action be not wholly discontinued, the costs occasioned by the matter so withdrawn. Such costs shall be taxed, and such discontinuance or withdrawal, as the case



## HUFFSTUTLER v. LOUISVILLE PACKING COMPANY.

SUPREME COURT OF ALABAMA. 1908.

[Reported 154 *Alabama*, 291.]

APPEAL from Birmingham City Court.

Heard before Hon. C. W. FERGUSON.

Action by the Louisville Packing Company against Hamilton H. Huffstutler. From a judgment granting a motion of plaintiff to dismiss the suit, defendant appeals. Affirmed.

Defendant interposed as a defense to the suit a counterclaim by way of set-off and recoupment. After the plaintiff had made out its case, which was not denied by the defendant, and after the defendant had introduced evidence of his counterclaim or set-off, the plaintiff offered to take a nonsuit, with bill of exceptions. The court refused to allow the plaintiff to take this nonsuit, and there was verdict and judgment for the defendant against the plaintiff in the sum of \$620. The plaintiff thereupon moved the court to set aside the judgment, on the ground that the court erred in not allowing plaintiff to take his nonsuit, and from this motion setting aside the verdict and judgment this appeal is prosecuted. . . .

ANDERSON, J. The general rule is, where the plaintiff has instituted a civil action, he has the right to dismiss or discontinue at his own cost at any time before verdict. This practice has been adopted, even in those cases where the defendant has pleaded a set-off and introduced evidence to sustain it. — *Griel v. Loftin*, 65 Ala. 591; *Branham v. Brown's Adm'x*, 1 Bailey (S. C.), 262; *Cummings v. Pruden*, 11 Mass. 206; *Waterman on Set-Off*, 659, 660; *Breese v. Allen*, 12 Ind. 426; *Moore v. Bres*, 18 La. Ann. 483.

It is insisted by counsel for the appellant that the rule above declared is merely applicable to the common law, which does not authorize judgment over for the defendant when the cross-demand exceeds the plaintiff's claim; that our statutes authorize a judgment over for the defendant, upon pleas of set-off and recoupment; and that what was said in the case of *Griel v. Loftin*, *supra*, was dictum. We concede that what was said in that case, on this sub-

may be, shall not be a defence to any subsequent action. Save as in this rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record or discontinue the action without leave of the court or a judge, but the court or a judge may, before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise as may be just, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out." — Ed.

ject, was dictum, as this question was not there involved; but the expression of the writer seems to be fortified by the weight of authority, and what was there said is applicable in jurisdictions where judgment over is provided, as well as under the common law. — *Anderson v. Gregory*, 43 Conn. 61; *Merchants' Bank of Canada v. Schulenberg*, 54 Mich. 49, 19 N. W. 741. This Michigan case was by a divided court, and resulted in an affirmance of the doctrine that the plaintiff can dismiss his suit at any time before verdict, although the defendant claimed a judgment over, and was authorized, under the statute, to recover for said excess. The opinion which controlled in this case was rendered by Cooley, C. J., and as it deals with several authorities on the subject, including the case relied upon by appellant's counsel, of *Riley v. Carter*, 3 Humph. (Tenn.), 230, we quote at length: "In this case the defendant relied upon a set-off, which, he claimed, was larger than the plaintiff's demand, and he brings the case to this court, assigning for error the order of the circuit court permitting the plaintiff, notwithstanding his objection, to submit to a nonsuit. The general right of the plaintiff to discontinue his suit, or to submit to a nonsuit, at any time before verdict, is undoubted; and, in the absence of any statute taking away the right, it exists in the cases where set-off is relied upon to the same extent as in other cases. This is fully recognized in *Cummings v. Pruden*, 11 Mass. 206, and *Branham v. Brown's Adm'x*, 1 Bailey (S. C.), 262. In several states statutes have been passed taking away the right; but we have no such statute. The fact that the statute of set-offs permits judgment to be taken by the defendant for the balance found due him does not preclude a discontinuance. — *Cummings v. Pruden*, *supra*. But it is said there are decisions to the contrary of these, and several are referred to. The Texas cases are not in point, as they are decided under the civil law, which does not prevail in this state. — *Egery v. Power*, 5 Tex. 501; *Walcott v. Hendrick*, 6 Tex. 406; *Bradford v. Hamilton*, 7 Tex. 5. The case of *Francis v. Edwards*, 77 N. C. 271, was decided upon a construction of the Code of that state, and therefore has no bearing. In *Riley v. Carter*, 3 Humph. (Tenn.), 230, the defendant had obtained judgment for his set-off in justice's court, and the plaintiff removed the case to the circuit court by *certiorari*, and then, in that court, was given leave to dismiss his suit. This was palpable error, and the court so held; but we discover no analogy between that case and this. The defendant had his judgment, and, unless error was shown, had a right to retain it. The three New York cases of *Cockle v. Underwood*, 3 Duer

(N. Y.), 676, *Rees v. Van Patten*, 13 How. Prac. 258, and *Van Allen v. Schermerhorn*, 14 How. Prac. 287, are not in point, because decided under the state Code; but, so far as they can be considered as having a bearing they are against the defendant, instead of for him, for they all recognize the power of the court in its discretion to permit the plaintiff to discontinue, which is all that is necessary to sustain this judgment."

It seems that the statement by the compiler on page 848 of 6 Am. & Eng. Ency. of Pl. & Pr., as to the modern rule, is not sustained by the weight of authority as to actions of law, but does obtain in chancery. The leading authority to the effect that a dismissal by the plaintiff will not deprive the defendant of his right to a judgment over is the case of *East St. Louis v. Thomas*, 102 Ill. 453. In that jurisdiction, they have a statute providing that, "when a plea of set-off shall have been interposed, the plaintiff shall not be permitted to dismiss his suit without the consent of the defendant or leave of court."

Whether the plaintiff was entitled to a bill of exceptions, under section 614 of the Code of 1896, or not, because his claim was admitted by the defendant and there was no adverse ruling in reference to same, we need not decide, as it is clear he had the right to nonsuit or dismiss at any time before the verdict. The trial court erred in not permitting the plaintiff to dismiss his case, and properly corrected the error by granting the motion for a new trial.

*The judgment of the city court is affirmed.*<sup>1</sup>

TYSON, C. J., and SIMPSON and McCLELLAN, JJ., concur.

<sup>1</sup> For conflicting views on the question involved in the principal case, see *Fowler v. Lawson*, 15 Ark. 148; *Gurr v. Brinson*, 138 Ga. 665, 75 S. E. 979; *Hickman v. Hunter* (Ia., 1913), 140 N. W. 425; *Cummings v. Pruden*, 11 Mass. 206; *Fink v. Bruihl*, 47 Mo. 173; *Hamlin v. Walker*, 228 Mo. 611, 128 S. W. 945; *Block v. Ottenberg*, 53 N. Y. Misc. Rep. 647, 103 N. Y. Supp. 739; *Boyle v. Stallings*, 140 N. C. 524, 53 S. E. 346; *Bertschy v. McLeod*, 32 Wis. 205. See 2 Thompson Trials, 2d ed., sec. 2232, and a note to the principal case in 15 L. R. A. (N.S.), 340. — ED.

## SECTION VI.

*Compulsory Nonsuit or Dismissal and Directed Verdict.*CENTRAL TRANSPORTATION COMPANY v. PULLMAN'S  
PALACE CAR COMPANY.

SUPREME COURT OF THE UNITED STATES. 1891.

[Reported 139 *United States*, 24.]

GRAY, J.<sup>1</sup> The principal defence in this case, duly made by the defendant, by formal plea, as well as by objection to the plaintiff's evidence, and sustained by the Circuit Court, was that the indenture of lease sued on was void in law, because beyond the powers of each of the corporations by and between whom it was made.

There is a preliminary question of practice, arising out of the manner in which the case was disposed of below, which is deserving of notice, although not mentioned by counsel in argument.

The Circuit Court, in ordering a nonsuit because in its opinion the evidence offered by the plaintiff was insufficient in law to maintain the action, acted in accordance with the statute of Pennsylvania, which provides that "it shall be lawful for the judge presiding at the trial to order a judgment of nonsuit to be entered, if in his opinion the plaintiff shall have given no such evidence as in law is sufficient to maintain the action, with leave, nevertheless, to move the court *in banc* to set aside such judgment of nonsuit; and in case the said court *in banc* shall refuse to set aside the nonsuit, the plaintiff may remove the record by writ of error into the Supreme Court for revision and review, in like manner and with like effect as he might remove a judgment rendered against him upon a demurrer to evidence." Penn. Stats., March 11, 1836, c. 34, § 7; March 11, 1875, c. 8; 2 Purdon's Digest (11th ed.), 1362, 1363.

Under that statute, as expounded by Chief Justice Gibson, the judge can order a nonsuit, only when all the evidence introduced, with every inference of fact that a jury might draw from it in favor of the plaintiff, appears to be insufficient in matter of law to sustain a verdict; and the defendant's motion for a nonsuit is equivalent to a demurrer to evidence, differing only in the judgment thereon not being a final determination of the rights of the parties, for if it

<sup>1</sup> The statement of facts is omitted together with a part of the opinion in which it was held that the contract sued on was *ultra vires*. — ED.



is in favor of the plaintiff the case must be submitted to the jury, and if in favor of the defendant it is no bar to a new action. *Smyth v. Craig*, 3 Watts & Sergeant, 14; *Fleming v. Insurance Co.*, Brightly, 102; *Bournonville v. Goodall*, 10 Penn. St. 133.

It is true that a plaintiff, who appears by the record to have voluntarily become nonsuit, cannot sue out a writ of error. *United States v. Evans*, 5 Cranch, 280; *Evans v. Phillips*, 4 Wheat. 73; *Cossar v. Reed*, 17 Q. B. 540. But in the case of a compulsory nonsuit it is otherwise; and a plaintiff, against whom a judgment of nonsuit has been rendered without his consent and against his objection, is entitled to relief by writ of error. *Elmore v. Grymes*, 1 Pet. 469; *Strother v. Hutchinson*, 4 Bing. N. C. 83; *S. C.* 5 Scott, 346, 6 Dowling, 238; *Voorhees v. Coombs*, 4 Vroom, 482.

There are many cases in the books, in which this court has held that a court of the United States had no power to order a nonsuit without the plaintiff's acquiescence. *Elmore v. Grymes*, above cited; *Crane v. Morris*, 6 Pet. 598, 609; *Silsby v. Foote*, 14 How. 218; *Castle v. Bullard*, 23 How. 172, 183. Yet, instead of overruling, upon that ground alone, exceptions to a refusal to order a nonsuit, this court, more than once, has considered and determined questions of law upon the decision of which the nonsuit was refused in the court below. *Crane v. Morris* and *Castle v. Bullard*, above cited.

The difference between a motion to order a nonsuit of the plaintiff and a motion to direct a verdict for the defendant is, as observed by Mr. Justice Field, delivering a recent opinion of this court, "rather a matter of form than of substance, except [that] in the case of a nonsuit a new action may be brought, whereas in the case of a verdict the action is ended, unless a new trial be granted, either upon motion or upon appeal." *Oscanyan v. Arms Co.*, 103 U. S. 261, 264.

Whether a defendant in an action at law may present in the one form or in the other, or by demurrer to the evidence, the defence that the plaintiff, upon his own case, shows no cause of action, is a question of "practice, pleadings, and forms and modes of proceeding," as to which the courts of the United States are now required by the act of Congress of June 1, 1872, c. 255, § 5 (17 Stat. 197), reenacted in § 914 of the Revised Statutes, to conform, as near as may be, to those existing in the courts of the State within which the trial is had. *Sawin v. Kenny*, 93 U. S. 289; *Ex parte Boyd*, 105 U. S. 647; *Chateaugay Co.*, petitioner, 128 U. S. 544; *Glenn v. Sumner*, 132 U. S. 152, 156.

It is doubtless within the authority of the presiding judge, and is often more convenient, in order to prevent the case from being brought up in such a form that the judgment of the court of last resort will not finally determine the rights of the parties, to adopt the course of directing a verdict for the defendant and entering judgment thereon.

But the judgment of nonsuit, being a final judgment disposing of the particular case, and rendered upon a ruling in matter of law duly excepted to by the plaintiff, is subject to be reviewed in this court by writ of error.

It was therefore rightly assumed by the counsel of both parties at the argument that the only question to be determined is of the correctness of the ruling sustaining the defence of *ultra vires*, independently of the form in which that question was presented and disposed of. . . . *Judgment affirmed.*<sup>1</sup>

MR. JUSTICE BROWN, not having been a member of the court when this case was argued, took no part in its decision.

## FLETCHER v. LONDON AND NORTHWESTERN RAILWAY COMPANY.

COURT OF APPEAL. 1891.

[Reported (1892) 1 *Queen's Bench*, 122.]

MOTION by the plaintiff for a new trial.

The action was for damages for personal injuries alleged to have been caused through the negligence of the defendants' servants.

At the trial, Wright, J., after hearing the opening of the plaintiff's counsel, stating the case which he expected to prove, nonsuited the plaintiff without the consent of his counsel, and in spite of his insisting that he ought to be allowed to call his witnesses.

<sup>1</sup> There is a conflict of authority on the question whether the plaintiff may be nonsuited against his will. See cases cited in *Hopkins v. Nashville C. & St. L. Ry.*, 96 Tenn. 409, 34 S. W. 1029, 32 L. R. A. 354; 2 *Thompson, Trials*, 2d ed., sec. 2228.

A territorial statute allowing a compulsory nonsuit does not deprive the plaintiff of the right of trial by jury under the Seventh Amendment to the Constitution of the United States. *Coughran v. Bigelow*, 164 U. S. 301, 41 L. ed. 442, 17 S. Ct. 117.

A compulsory nonsuit, like a voluntary nonsuit, does not deprive the plaintiff of the right to bring a new action for the same cause. *Mason v. Kansas City Belt Ry. Co.*, 226 Mo. 212, 125 S. W. 1128, 26 L. R. A. (N.S.), 914. — ED.

LORD ESHER, M. R.<sup>1</sup> I am of opinion that the learned judge struck too soon. I will state the proposition in its broadest form. In my opinion a judge has no right, without the consent of the plaintiff's counsel, to non-suit the plaintiff upon his counsel's opening statement of the facts. The opening of counsel may be incorrect in consequence of his having had wrong instructions. Owing to some accident, even with the greatest care, the evidence of the witnesses when they are called may differ from that which has been opened by counsel. It is for that very reason that a right of reply is given to the plaintiff's counsel, and in recent times a right to sum up the evidence has been given to the plaintiff's counsel, and the defendant's respectively, after his witnesses have been called. The experience of judges and of practitioners shews that the evidence often turns out to be somewhat different from that which appears in the instructions given to counsel. Therefore I state this proposition in its full extent—a judge has no right to non-suit a plaintiff upon his counsel's opening without the consent of the counsel. That is what the learned judge has done in the present case. There was no assent on the part of the plaintiff's counsel. On the contrary, the plaintiff's counsel insisted upon his right to have the plaintiff's witnesses called, but, notwithstanding this, the learned judge persisted in non-suiting the plaintiff on his counsel's opening. I think he was wrong in so doing, and the case must go down for trial. *Order for new trial accordingly.*<sup>2</sup>

KELLY, Administrator, v. BERGEN COUNTY GAS CO.

COURT OF ERRORS AND APPEALS OF NEW JERSEY. 1907.

[Reported 74 *New Jersey Law*, 604.]

MAGIE, CHANCELLOR.<sup>3</sup> Upon the opening of the counsel for the plaintiff in the trial of the issue in this cause the learned trial justice directed a nonsuit. Thereafter, judgment for the defendant was entered and this writ of error was taken. The error assigned was the granting of the nonsuit.

<sup>1</sup> The concurring opinions of Lopes, L.J., and Kay, L.J., are omitted. — Ed.

<sup>2</sup> *Pietsch v. Pietsch*, 215 Ill. 454, 92 N. E. 325, 29 L. R. A. (N.S.), 218; *Fisher v. Fisher*, 5 Wis. 472, *accord*. *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261, 26 L. ed. 539; *Hey v. Prime*, 197 Mass. 474, 84 N. E. 141, 17 L. R. A. (N.S.), 570 (*semble*); *Crisup v. Grosslight*, 79 Mich. 380, 44 N. W. 624; *Pratt v. Conway*, 148 Mo. 291, 49 S. W. 1028, 71 Am. St. Rep. 602 (*semble*), *contra*. — Ed.

<sup>3</sup> A part of the opinion is omitted. — Ed.

A motion for a nonsuit upon the opening of counsel is not frequently resorted to. In dealing with it, it is obvious that the rule which is applied to a motion for a nonsuit at the close of plaintiff's evidence is the one which should be applied. In both cases, the question presented is whether the facts stated or proved, and reasonable inferences which may be drawn therefrom, disclose that the plaintiff is not entitled to submit his case to the jury, because a verdict in his favor could not be maintained. In practice, a motion for a nonsuit, made upon the opening of counsel, is, perhaps, more liberally treated than an application for a nonsuit at the close of the plaintiff's case. In the former case, if objection be made to a statement too meagre to sustain the plaintiff's case, counsel will, doubtless, be permitted to enlarge his statement. But in the haste required by the pressure of business at the present day, counsel, in general, restrict themselves to a mere outline of the case they design to present.

The opening appearing in the bill of exceptions is somewhat meagre, and if objected to on that ground, counsel would, no doubt, have been permitted to make his statement more complete.

But I think it does present a case for the jury if the facts stated therein were proved. It appears thereby that the defendant company, which furnishes light to a municipality, maintained wires upon a pole, and through those wires transmitted at times a current which was dangerous. Upon the same pole were strung wires of a telephone company by which plaintiff's intestate was employed as a lineman. The nature of the relation between the telephone company and the defendant company was not stated in the opening. But from the fact that the telephone company was maintaining the wires used in the business of that company upon the pole, it may be reasonably inferred that that company had acquired a right to so maintain them. If that inference were drawn, it would also follow that the telephone company had a right to resort to those wires for repairing and rearranging them. Its workmen, when sent to make repairs or to rearrange the wires, if in such employment they were required to ascend the poles, would not be trespassers, nor would they resort to the summit of the poles out of mere curiosity, but they would be there to exercise the right which their employer had in respect to its wires. It would also follow that the defendant company might be inferred to have knowledge that in the exercise of that right of the telephone company the workmen of the latter company would be compelled to ascend the poles and be brought into very close proximity with the



wires of the defendant company, and it might be therefrom inferred that a duty devolved upon the company to use reasonable care not to endanger the safety of such workmen by the dangerous current passing through its wires. . . .

Counsel, in his opening, asserted that the defendant company had failed in the performance of the duty cast upon it in two respects — *first*, by having its wires apparently insulated while the insulation was, in fact, defective; and *second*, by sending a dangerous current through its wires at a time which was unusual and without notice.

The defendant company was a company for lighting the municipality and, customarily, sent its current through the wires only after the lights were required to be used. The plaintiff's intestate was killed by a current passing through the wires at half-past four in the afternoon, in midsummer.

If the motion for a nonsuit had been made upon the ground that the opening failed to disclose an act of negligence on the part of the defendant company, I think it would have been properly refused. For the reasons above given, I think that the opening, though meagre in statement, yet contained enough facts which permitted sufficiently reasonable inferences therefrom, so as to make out the plaintiff's case, if the facts were proved.

But the application was distinctly put by counsel for the defendant company upon an admission made in the opening to the effect that plaintiff's intestate had handled the wire of the defendant company with naked hands and without the protection of rubber gloves, and that that admission indicated that the deceased had failed to take that care for his personal safety which every man is required to take, and thereby negligently contributed to the injury which occasioned his death. It is obvious, moreover, from the colloquy which took place between the trial justice and the counsel, that the granting of the motion to nonsuit was placed by the justice entirely upon this ground, and he gave no consideration whatever to any supposed defect in the opening on any other point.

As was said by Justice O'Brien in the case of *Hoffman House v. Foote*, 172 N. Y. 348, in dealing with a question of a judgment dismissing the plaintiff's complaint upon the opening of counsel, the plaintiff's counsel may, in his opening address, by some admission or statement of facts, so completely ruin his case that the court is justified in granting a nonsuit. That was the position which the defendant company assumed in supporting this application for a nonsuit, and the learned justice who presided at the trial found

that by the admission of the counsel of the plaintiff a fact was introduced which required the case to be taken from the jury.

But the learned trial justice, in reaching the conclusion that the contributory negligence of plaintiff's intestate was a necessary inference from the admitted fact that he handled the wire without the protection of rubber gloves, ignored two facts also stated in the opening. One fact was that the wire handled appeared to be protected by insulation, but that the insulation was defective. The other fact was that the wires of the defendant company did not ordinarily carry any current in the daytime, which fact was known to plaintiff's intestate.

In my judgment, upon the whole opening, if proved, it was for the jury to say whether, with this knowledge, the lineman was negligent in assuming that there was no risk in handling such a wire, which was not then customarily employed in distributing a current for electric light, and which appeared to be insulated. The case, in respect to assumption of risk, is not unlike the case of *Snyer v. New York and New Jersey Telephone Co.*, 44 Vroom, 535, in which, under similar circumstances, this court declared that there was a question for the jury on that subject.

The result is that the judgment must be reversed for a *venire de novo*.<sup>1</sup>

*For affirmance* — None.

*For reversal* — THE CHANCELLOR, CHIEF JUSTICE, GARRISON, FORT, HENDRICKSON, PITNEY, SWAYZE, REED, BOGERT, VREDENBURGH, VROOM, GREEN, DILL, JJ. 13.

## BERRY v. DRYDEN.

SUPREME COURT OF MISSOURI. 1842.

[Reported 7 *Missouri*, 324.]

SCOTT, J.<sup>2</sup> Francis Berry brought an action of slander against William Dryden. The declaration contained four counts, of which the plaintiff relied on the first two. In these, the words charged to have been spoken, were the following: "He (meaning the plain-

<sup>1</sup> *Butler v. National Home*, 144 U. S. 64, 36 L. ed. 351, 12 S. Ct. 581; *Brashear v. Rabenstein*, 71 Kan. 455, 80 Pac. 950; *D'Aloia v. Unione Fratellanza*, 84 N. J. L. 683, 87 Atl. 472; *Hoffman House v. Foote*, 172 N. Y. 348, 65 N. E. 169, *accord*.

As to the right to change the opening statement, see *Barto v. Detroit Iron & Steel Co.*, 155 Mich. 94, 118 N. W. 738. — Ed.

<sup>2</sup> A part of the opinion is omitted. — Ed.

tiff), had sworn a lie in Kentucky, and that it was in him, for he had sworn what he could prove to be a point blank lie, this day, before Squire Davis. . . ."

On the trial it was proved that the defendant had said of the plaintiff, that he had sworn off a just account, before Squire Davis, and that he would, or could prove it, at the circuit court by a witness; that he had been had up for perjury in Kentucky, and the records would show it.

The defendant's counsel moved the court to instruct the jury, that the words laid in the declaration were not supported by the proof. This instruction was given and excepted to, and is now assigned for error.

The plaintiff has made a preliminary objection to the instruction, and insists, that it is the province of the jury and not of the court, to determine whether there is such an identity between the words proved, and those laid in the declaration, as will support the action. This position cannot be maintained. Whether a variance exists or not, between the declaration and proof, is a question exclusively for the determination of the court. The jury ascertains what words were spoken, and if there is a variance between them and the words contained in the declaration, will look to the opinion of the court, in order to be informed, whether it is of such a nature as will defeat the action.

After the many decisions that have been made on the subject of variance, in actions of slander, no authority will be required, to show that the words proved to have been spoken, are not substantially the same as those laid in the declaration. The rule is stated in the books, that the slander proved must substantially correspond with that charged in the declaration. By this, it is not to be understood, that if certain words are employed to convey a slanderous imputation, those words will support a declaration containing the same imputation in different words. The meaning of the rule seems to be, that, if the words charged to have been spoken are proved, but with the omission, or addition of others not at all varying, or affecting their sense, the variance will not be regarded. Although the words proved are equivalent to the words charged in the declaration, yet not being the same in substance, an action cannot be maintained; and although the same idea is conveyed in the words charged and those proved, yet if they are not substantially the same words, though they contain the same charge, but in different phraseology, the plaintiff is not entitled to recover. In *Maitland v. Goldney*, 2 East, 438, it is said, " Though the plaintiff

need not prove all the words laid, yet he must prove so much of them, as is sufficient to sustain his cause of action, and it is not enough for him to prove equivalent words of slander." It is necessary that this rule be adhered to, in order to let the party know what he has to defend, and that he may not be held responsible for the misunderstanding of the witnesses, as he might, if they were permitted to testify as to the import of his words. 2 Phil. Evidence, 97. . . .

*The judgment will be affirmed.*<sup>1</sup>

[3 & 4 William IV., Chapter 42, Section 23, (1833).]

"And whereas great Expence is often incurred, and Delay or Failure of Justice takes place, at Trials, by reason of Variances as to some Particular or Particulars between the Proof and the Record or setting forth, on the Record or Document on which the Trial is had, of Contracts, Customs, Prescriptions, Names, and other Matters or Circumstances not material to the Merits of the Case, and by the Mis-statement of which the opposite Party cannot have been prejudiced, and the same cannot in any Case be amended at the Trial, except where the Variance is between any Matter in Writing or in Print produced in Evidence and the Record:<sup>2</sup> And whereas it is expedient to allow such Amendments as herein-after mentioned to be made on the Trial of the Cause;" be it therefore enacted, That it shall be lawful for any Court of Record, holding Plea in Civil Actions, and any Judge sitting at *Nisi Prius*, if such Court or Judge shall see fit so to do, to cause the Record, Writ, or Document on which any Trial may be pending before any such Court or Judge, in any Civil Action, or in any Information in the Nature of a *Quo warranto*, or Proceedings on a *Mandamus*, when any Variance shall appear between the Proof and the Recital or setting forth, on the Record, Writ, or Document on which the Trial is proceeding, of any Contract, Custom, Prescription, Name, or other Matter, in any Particular or Particulars in the Judgment of such Court or Judge not material to the Merits of the Case, and by which the opposite Party cannot have been prejudiced in the Conduct of his Action, Prosecution, or Defence, to be forthwith amended by some Officer of the Court or otherwise, both in the Part of the Pleadings where such Variance occurs, and in every other Part of the Pleadings which it may become necessary to amend, on such Terms as to Payment of Costs to the other Party, or postpon-

<sup>1</sup> See Stephen, Pleading, Williston's ed., p. \*93; Tidd, New Practice, p. 512; Thompson, Trials, 2d ed., secs. 2251-2262. — ED.

<sup>2</sup> See Stat. 9 Geo. IV, c. 15. — ED.



ing the Trial to be had before the same or another Jury, or both Payment of Costs and Postponement, as such Court or Judge shall think reasonable; and in case such Variance shall be in some Particular or Particulars in the Judgment of such Court or Judge not material to the Merits of the Case, but such as that the opposite Party may have been prejudiced thereby in the Conduct of his Action, Prosecution, or Defence, then such Court or Judge shall have Power to cause the same to be amended upon Payment of Costs to the other Party, and withdrawing the Record or postponing the Trial as aforesaid, as such Court or Judge shall think reasonable; and after any such Amendment the Trial shall proceed, in case the same shall be proceeded with, in the same Manner in all respects, both with respect to the Liability of Witnesses to be indicted for Perjury, and otherwise, as if no such Variance had appeared; and in case such Trial shall be had at *Nisi Prius* or by virtue of such Writ as aforesaid, the Order for the Amendment shall be indorsed on the *Postea* or the Writ, as the Case may be, and returned together with the Record or Writ, and thereupon such Papers, Rolls, and other Records of the Court from which such Records or Writ issued, as it may be necessary to amend, shall be amended accordingly; and in case the Trial shall be had in any Court of Record, then the Order for Amendment shall be entered on the Roll or other Document upon which the Trial shall be had; provided that it shall be lawful for any Party who is dissatisfied with the Decision of such Judge at *Nisi Prius*, Sheriff, or other Officer, respecting his Allowance of any such Amendment, to apply to the Court from which such Record or Writ issued for a new Trial upon that Ground, and in case any such Court shall think such Amendment improper, a new Trial shall be granted accordingly, on such Terms as the Court shall think fit, or the Court shall make such other Order as to them may seem meet.

[New York Code of Civil Procedure.]

Sec. 539. A variance, between an allegation in a pleading and the proof, is not material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defence, upon the merits. If a party insists that he has been misled, that fact, and the particulars in which he has been misled, must be proved to the satisfaction of the court. Thereupon the court may, in its discretion, order the pleading to be amended, upon such terms as it deems just.

Sec. 540. Where the variance is not material, as prescribed in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

Sec. 541. Where, however, the allegation to which the proof is directed, is unproved, not in some particular or particulars only, but in its entire scope and meaning, it is not a case of variance, within the last two sections, but a failure of proof.

EWING *et al.* v. GOODE.

CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT  
OF OHIO. 1897.

[Reported 78 *Federal Reporter*, 442.]

Taft, Circuit Judge.<sup>1</sup> In this case the petition of Nellie Ewing, the plaintiff, alleges that she employed the defendant, Goode, a surgeon and oculist, to cure her of a certain malady of her eye, for a reward to be paid therefor; that defendant entered upon such employment, but did not use proper care and skill in the operating on the eye of plaintiff, and did not bestow proper attention and treatment upon the eye after the operation, causing her to suffer great pain, and to lose the right eye entirely, and to impair the sight of her left eye. The answer of the defendant denies unskilfulness or lack of attention on his part and any injury to the plaintiff caused thereby. . . .

Before the plaintiff can recover, she must show by affirmative evidence — first, that defendant was unskilful or negligent; and, second, that his want of skill or care caused injury to the plaintiff. If either element is lacking in her proof, she has presented no case for the consideration of the jury. The naked facts that defendant performed operations upon her eye, and that pain followed, and that subsequently the eye was in such a bad condition that it had to be extracted, establish neither the neglect and unskilfulness of the treatment, nor the causal connection between it and the unfortunate event. A physician is not a warrantor of cures. If the maxim, "*Res ipsa loquitur*," were applicable to a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practise the healing art, for

<sup>1</sup> A part of the opinion, in which the learned judge examined the evidence, is omitted. — Ed.

they would have to assume financial liability for nearly all the "ills that flesh is heir to."

The preliminary question for the court to settle in this case, therefore, is whether there is any evidence sufficient in law to sustain a verdict that defendant was unskilful or negligent, and that his want of skill or care caused injury. In the courts of this and other states the rule is that if the party having the burden of proof offer a mere scintilla of evidence to support each necessary element of his case, however overwhelming the evidence to the contrary, the court must submit the issue thus made to the jury, with the power to set aside the verdict if found against the weight of the evidence. In the federal courts this is not the rule. According to their practice, if the party having the burden submits only a scintilla of evidence to sustain it, the court, instead of going through the useless form of submitting the issue to the jury, and correcting error, if made, by setting aside the verdict, may in the first instance direct the jury to return a verdict for the defendant. Hence our inquiry is: Does the case now submitted show more than a scintilla of evidence tending to show want of skill or care by defendant, or injury caused thereby? *Railway Co. v. Lowery*, 20 C. C. A. 596, 74 Fed. 463. . . .

The condition of the plaintiff cannot but awaken the sympathy of every one, but I must hold that there is no evidence before the court legally sufficient to support a verdict in her favor. I should deem it my duty without hesitation to set aside a verdict for the plaintiff in this case as often as it could be rendered, and, that being true, it becomes my duty to direct a verdict for the defendant.<sup>1</sup>

### MCDONALD, as administratrix, *v.* THE METROPOLITAN STREET RAILWAY COMPANY.

COURT OF APPEALS OF NEW YORK. 1901.

[Reported 167 *New York*, 66.]

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 19, 1900, upon an order affirming a judgment in favor of defendant

<sup>1</sup> See *Ryder v. Wombwell*, L. R. 4 Exch. 32; *Hiddle v. National Fire, etc., Co.*, [1896] A. C. 372; *Commissioners of Marion County v. Clark*, 94 U. S. 278, 24 L. ed. 59; *Offutt v. Columbian Exposition*, 175 Ill. 472, 51 N. E. 651; *Hillyer v. Dickinson*, 154 Mass. 502, 28 N. E. 905; *Theobald v. Shepard*, 75 N. H. 52, 71 Atl. 26. But see *Whaley v. Bartlett*, 42 S. C. 454, 20 S. E. 745.—Ed.

entered upon a verdict directed by the court and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

MARTIN, J. This action was for personal injuries resulting in the death of the plaintiff's intestate, and was based upon the alleged negligence of the defendant. An appeal was allowed to this court upon the ground of an existing conflict in the decisions of different departments of the Appellate Division as to when a verdict may be directed where there is an issue of fact, and because in this case an erroneous principle was asserted which, if allowed to pass uncorrected, would be likely "to introduce confusion into the body of the law." *Sciolina v. Erie Preserving Co.*, 151 N. Y. 50. The court having directed a verdict, the appellant is entitled to the most favorable inferences deducible from the evidence, and all disputed facts are to be treated as established in her favor. *Ladd v. Ætna Ins. Co.*, 147 N. Y. 478, 482; *Higgins v. Eagleton*, 155 N. Y. 466; *Ten Eyck v. Whitbeck*, 156 N. Y. 341, 349; *Bank of Monongahela Valley v. Weston*, 159 N. Y. 201, 208.

If believed, the testimony of the plaintiff's witnesses was sufficient to justify the jury in finding the defendant negligent and the plaintiff's intestate free from contributory negligence. The evidence of the defendant was in many respects in direct conflict, and if credited would have sustained a verdict in its favor. Whether the defendant was negligent, the plaintiff's intestate free from contributory negligence, and the amount of damages, were submitted to the jury. It, however, having agreed upon a general verdict and failed to answer the questions submitted, the trial judge withdrew them and directed a verdict for the defendant. Upon the verdict so directed a judgment was entered. Subsequently an appeal was taken to the Appellate Division, where it was affirmed, and the plaintiff has now appealed to this court.

Although there was a direct and somewhat severe conflict in the evidence, the questions of negligence and contributory negligence were clearly of fact, and were for the jury and not for the court unless the right of trial by jury is to be partially if not wholly abolished. It was assumed below that the plaintiff's evidence established a case which, undisputed, was sufficient to warrant a verdict in her favor. But the court said that at the close of the defendant's evidence the plaintiff's case had been so far overcome that a verdict in her favor would have been set aside as against the weight of evidence. Upon that alleged condition of the proof, it



held that the trial court might have properly submitted the case to the jury if it saw fit, but that it was not required to as the verdict might have been thus set aside. The practical result of that decision, if sustained, is in every close case to vest in the trial court authority to determine questions of fact, although the parties have a right to a jury trial, if it thinks that the weight of evidence is in favor of one and it directs a verdict in his favor.

There have been statements by courts which seem to lend some justification to that theory, but we think no such broad principle has been intended and that no such rule can be maintained either upon principle or authority. The rule that a verdict may be directed whenever the proof is such that a decision to the contrary might be set aside as against the weight of evidence would be both uncertain and delusive. There is no standard by which to determine when a verdict may be thus set aside. It depends upon the discretion of the court. The result of setting aside a verdict and the result of directing one are widely different and should not be controlled by the same conditions or circumstances. In one case there is a re-trial. In the other the judgment is final. One rests in discretion; the other upon legal right. One involves a mere matter of remedy or procedure. The other determines substantive and substantial rights. Such a rule would have no just principle upon which to rest.

While in many cases, even where the evidence is sufficient to sustain it, a verdict may be properly set aside and a new trial ordered, yet, that in every such case the trial court may, whenever it sees fit, direct a verdict and thus forever conclude the parties, has no basis in the law, which confides to juries and not to courts the determination of the facts in this class of cases.

We think it cannot be correctly said in any case where the right of trial by jury exists and the evidence presents an actual issue of fact, that the court may properly direct a verdict. So long as a question of fact exists, it is for the jury and not for the court. If the evidence is insufficient, or if that which has been introduced is conclusively answered, so that, as a matter of law, no question of credibility or issue of fact remains, then the question being one of law, it is the duty of the court to determine it. But whenever a plaintiff has established facts or circumstances which would justify a finding in his favor, the right to have the issue of fact determined by a jury continues, and the case must ultimately be submitted to it.

The credibility of witnesses, the effect and weight of conflicting and contradictory testimony, are all questions of fact and not ques-

tions of law. If a court of review having power to examine the facts is dissatisfied with a verdict because against the weight or preponderance of evidence, it may be set aside, but a new trial must be granted before another jury so that the issue of fact may be ultimately determined by the tribunal to which those questions are confided. If there is no evidence to sustain an opposite verdict, a trial court is justified in directing one, not because it would have authority to set aside an opposite one, but because there was an actual defect of proof, and, hence, as a matter of law, the party was not entitled to recover. *Colt v. Sixth Ave. R. R. Co.*, 49 N. Y. 671; *Bagley v. Bowe*, 105 N. Y. 171, 179.

We have recently considered the question involved in the case at bar, have practically reaffirmed the doctrine of the foregoing cases, and have reviewed the cases upon which the court below seems to have based its decision. *Fealey v. Bull*, 163 N. Y. 397.

The learned judge who delivered the opinion in that case plainly demonstrated that the doctrine enunciated by the court below has no actual support in *Linkauf v. Lombard* (137 N. Y. 417) and *Hemmens v. Nelson* (138 N. Y. 517). He shows that in those cases there was no sufficient evidence to sustain the verdicts, and that if there had been this court would have had no jurisdiction to reverse. His examination further discloses that the reversal in the *Linkauf* case was upon the ground that the proof amounted at most to a mere surmise, and that in the *Hemmens* case the principle that if there is any evidence upon a question of fact it should be submitted to the jury, was asserted. The clearness and ability with which the question was discussed by him render it unnecessary to further consider it at this time.

We are of the opinion that a plain issue of fact was presented for the jury; that the court erred in directing a verdict; that the judgment and order should be reversed and a new trial granted, with costs to abide the event.

PARKER, Ch. J., BARTLETT, VANN, CULLEN and WERNER, JJ.,  
concur; GRAY, J., dissents. *Judgment reversed, etc.*<sup>1</sup>

<sup>1</sup> See *Jewell v. Parr*, 13 C. B. 909; *Dublin, etc., Ry. Co. v. Slattery*, 3 A. C. 1155, *Denny v. Williams*, 5 Allen (Mass.), 1; *Crosby v. Wells*, 73 N. J. L. 790, 67 Atl. 295.

In *Donovan v. Connecticut Co.*, 86 Conn. 82, 84 Atl. 288, the court, Wheeler, J., said (p. 86):

"All courts agree that the trier — judge or jury — may infer facts from those already found, upon which its ultimate conclusion may rest in whole or part. *Bunnell v. Berlin Iron Bridge Co.*, 66 Conn. 24, 36, 33 Atl. 533; *C. & C. Electric Motor Co. v. D. Frisbie & Co.*, 66 Conn. 67, 78, 33 Atl. 604; *Doyle v.*

SPEAR *v.* HAGGARTY.

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT. 1911.

[Reported 163 *Illinois Appellate Court Reports*, 27.]

CLARK, J. Recovery was had for \$83, being rent for an apartment for two months and part of a third.

The only defense interposed was that the apartment had not been renovated as required by the terms of the lease.

The trial was had before the court and a jury, the court, however, directing the jury to find a verdict for the plaintiff.

Boston & A. R. Co., 145 Mass. 386, 14 N. E. 461. And the jury may make all inferences and conclusions which, in their judgment and discretion, may logically and reasonably be drawn from the facts in evidence. North Chicago Street R. Co. *v.* Rodert, 203 Ill. 413, 67 N. E. 812; Columbus *v.* Strassner, 138 Ind. 301, 34 N. E. 5, 37 *id.* 719; Gavett *v.* Manchester & L. R. Co., 16 Gray (Mass.), 501, 506.

"The test is, not that the inference must unavoidably and unerringly point in one direction, but rather, whether the rational mind could with reasonable-ness draw the inference. Hanrahan *v.* Baltimore City, 114 Md. 517, 535, 79 Atl. 197; M'Elderry *v.* Flannagan, 1 Harris & G. (Md.), 308.

"If two rational minds could reasonably draw different inferences from facts in evidence, whether controverted or uncontroverted, the decision is for the jury. Mumma *v.* Easton & A. R. Co., 73 N. J. L. 653, 658, 65 Atl. 208; Harvel *v.* Weldon Lumber Co., 154 N. C. 254, 262, 70 S. E. 389; Central Coal & Iron Co. *v.* Owens, 142 Ky. 19, 21, 133 S. W. 966; Powers *v.* St. Louis Transit Co., 202 Mo. 267, 100 S. W. 655; Miller *v.* Sovereign Camp, 140 Wis. 505, 507, 122 N. W. 1126; Galvin *v.* Brown & McCabe, 53 Ore. 598, 101 Pac. 671; Henry *v.* Omaha Packing Co., 81 Neb. 237, 115 N. W. 777.

"In the first instance, the court determines whether there is any evidence having a logical and reasonable tendency to prove the fact, or the inference in dispute. If not, it should not submit the question to the jury. Theobald *v.* Shepard, 75 N. H. 52, 55, 71 Atl. 26; Gavett *v.* Manchester & L. R. Co., 16 Gray (Mass.), 501. On the other hand, if reasonable men might find the fact or draw the inference, the court must leave the determination to the jury.

"The court will judge the reasonableness of the inference claimed in the light of the evidence as weighed by its experience and knowledge of events, and if its conclusion be that there is no probability or presumption that would lead to this inference, it will exclude its consideration from the jury; if it conclude that there is such a probability or presumption, or that reasonable men, reasoning logically, might reach several conclusions, of which the one claimed was one, it will leave its finding and consideration to the jury. Doyle *v.* Boston & A. R. Co., 145 Mass. 386, 388, 14 N. E. 461."

And see Ketterman *v.* Dry Fork R. R. Co., 48 W. Va. 606, 37 S. E. 683.

Professor Wigmore suggests as a test, "whether the proponent's evidence is so slight that a favorable verdict based upon that evidence alone would appear incomprehensible as a matter of reasoning." Pocket Code of Evidence, sec. 2002; and see 4 Wigmore, Evidence, sec. 2494. — *Ed.*

No question of law is involved. We have examined the record and find nothing in it to justify the claim of the defendant that the clause of the lease which provided that the flat should be thoroughly renovated had not been complied with. *Affirmed.*<sup>1</sup>

## WRIGHT v. SOUTHERN RAILWAY COMPANY.

SUPREME COURT OF NORTH CAROLINA. 1911.

[Reported 155 *North Carolina*, 325.]

THIS is an action to recover damages for personal injury, on the ground of negligence. . . . There was a judgment of nonsuit, from which the plaintiff appealed.<sup>2</sup>

ALLEN, J. It is true, as contended by the learned counsel for the plaintiff, that the defendant must plead contributory negligence, and that the plea is not good when it does no more than deny the negligence of the defendant and allege that the plaintiff was injured by his own negligence. Revisal, sec. 483; *Cogdell v. R. R.*, 132 N. C. 855.

The defendant, as appears from the answer, has done more than this, and we think it is entitled to avail itself of the defense. It has alleged that the plaintiff entered upon the track of the defendant without looking and listening, and that he recklessly attempted to cross the track in front of an approaching train.

We also concur in the interesting and able discussion of the relative functions of the judge and jury, and of the importance of preventing encroachment by one on the powers of the other, but we must recognize the principle, firmly established, that the judge must decide, as matter of law, the preliminary question whether there is any legal evidence to be submitted to the jury.

In the determination of this question, caution should be observed and the construction of the evidence most favorable to the plaintiff should be adopted.

Considering the evidence in this light, we must sustain the ruling of the judge, as it appears clear to us that the plaintiff was guilty of contributory negligence on his own evidence.

There was much controversy at one time as to the right of the defendant to avail itself of the plea of contributory negligence on a motion to nonsuit, but it is now the accepted doctrine with us that

<sup>1</sup> See *Brown v. Drake*, 109 Ga. 179, 34 S. E. 309; *Angus v. Chicago Trust & Savings Bank*, 170 Ill. 298, 48 N. E. 946. — Ed.

<sup>2</sup> A part of the statement of facts in which the evidence is set out in detail is omitted. — Ed.



it can do so if it is disclosed by the evidence of the plaintiff. If the plaintiff entered on the track without looking and listening, or if he looked and listened and attempted to drive in front of the train, in either case he would be guilty of contributory negligence.

He says that when he was sixteen or seventeen feet from the track, Hall, who was in the buggy with him, told him he heard another train, and jumped out and told him to whip up or he would be caught; that he turned and saw the train, two or three rail lengths from him, and that he whipped his mare to force him across.

It is true he was not injured on the crossing, but he would not have been injured at all if he had not negligently placed himself in a position of danger.

The citation of authority is needless, as there is no controversy between the plaintiff and the defendant as to what the law is, but as to its application. *Affirmed.*<sup>1</sup>

CLARK *v.* OREGON SHORT LINE RAILROAD COMPANY,  
a Corporation.

SUPREME COURT OF UTAH. 1899.

[Reported 20 *Utah*, 401.]

BASKIN, J.<sup>2</sup> This is an action in which the plaintiff, who is the respondent, seeks to recover the value of a cow alleged to have been killed through the negligence of the appellant in running one of its freight trains. The answer denied the negligence of the appellant alleged by plaintiff. Contributory negligence on the part of the plaintiff was not plead in the answer.

At the close of the testimony the appellant requested the trial court to instruct the jury to return a verdict in favor of defendant, of no cause of action. This request was denied, and the jury returned a verdict in favor of plaintiff for \$50.00.

The only error assigned and urged by appellant is, that said request was improperly refused.

<sup>1</sup> See *Neal v. Carolina C. R. R. Co.*, 126 N. C. 634, 36 S. E. 117, 49 L. R. A. 684. But see *Whaley v. Bartlett*, 42 S. C. 454, 20 S. E. 745. Compare *American Exch. Nat. Bank v. N. Y. B. & P. Co.*, 148 N. Y. 698, 43 N. E. 168.

A nonsuit should not be granted nor a verdict directed for the defendant where the plaintiff's evidence merely tends to disclose a defense. *Baker v. K. C., F. S. & M. R. R. Co.*, 122 Mo. 533, 26 S. W. 20; *Rhyner v. City of Memphis*, 97 Wis. 523, 73 N. W. 41. — Ed.

<sup>2</sup> The statement of facts and a part of the opinion in which the evidence is considered in detail are omitted. — Ed.

It is well settled that the court may withdraw the case from the jury altogether, and direct a verdict for the plaintiff or defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict in opposition to it. *Pool v. Southern Pac. Co.*, 20 Utah, 210, 58 Pac. 330, and cases cited.

In the case of *Bunnell v. Railway Co.*, 13 Utah, 314-323, it is held that, "Generally, contributory negligence, is a matter of defense, and must be alleged and proven by the defendant; but where the testimony on the part of the plaintiff, who seeks to recover damages for injuries resulting from negligence, shows conclusively that his own negligence or want of ordinary care was the proximate cause of the injury, he will not be permitted to recover, even though the answer contains no averment of contributory negligence."

It follows from the foregoing rules, which are well established, that if the evidence in this case clearly shows that the plaintiff was guilty of negligence, which materially contributed to the proximate cause of the injury complained of, then the trial court erred in refusing to instruct the jury as requested by defendant. . . .

Under the ruling in *Bunnell v. Railway Co.*, we are of the opinion that the evidence clearly shows that the plaintiff was guilty of negligence which materially contributed to the killing of his cow.

The judgment of the court below is reversed, with directions to grant a new trial, and it is ordered that respondent pay the costs.<sup>1</sup>

BARTCH, C. J., and MINER, J., concur.

## LONZER v. LEHIGH VALLEY RAILROAD COMPANY.

SUPREME COURT OF PENNSYLVANIA. 1900.

[Reported 196 *Pennsylvania State*, 610.]

TRESPASS for the death of plaintiff's husband. Before EDWARDS, J.

At the trial it appeared that Michael Lonzer, plaintiff's husband, was killed on January 20, 1896, while working as a locomotive engineer on one of defendant's trains. The accident occurred near Hazelton, and was caused by a subsidence of the track.

<sup>1</sup> *Chaney v. L. & M. R. R. Co.*, 176 Mo. 598, 75 S. W. 595, *accord*.

But a nonsuit should not be granted nor a verdict directed for the defendant where the plaintiff's evidence merely tends to disclose a defense. *Holland v. Oregon Short Line R. R. Co.*, 26 Utah, 209, 72 Pac. 940. — ED.

This subsidence was due to the sinking of the land over mine workings from which the coal had been removed. Plaintiff was running his train at the time of the accident at the rate of about twenty-five miles an hour. There was evidence that three weeks prior to the accident a notice had been placed on the assistant train master's bulletin board that, "All trains will run slow between Sugar Loaf Switch and South Sugar Loaf, account track settling." There was evidence that running slow meant eight to ten miles an hour. Deceased's fireman testified that Lonzer had a copy of the order in his possession, and had showed it to the witness. The court submitted the case to the jury.

Verdict and judgment for plaintiff for \$3,000. Defendant appealed.

*Error assigned* was in submitting the case to the jury.

MITCHELL, J. The plaintiff's husband was engineer of a train which was derailed by a subsidence of the track, and he was killed. The defense was his own contributory negligence.

It appeared by the undisputed evidence that the track was laid for a considerable distance over mine workings from which the coal had been removed; that from time to time prior to the accident there had been cavings in of the surface along the railroad's right of way; that the road was known to be in an unsafe condition from this tendency, and that the accident resulting in deceased's death arose from this cause. On the argument several points were made by appellant in regard to deceased's contributory negligence, but we do not find it necessary to notice any but one.

The recognition of the dangerous condition of the track was such that the company had begun a change of location, and pending the completion of the work had posted a notice on the bulletin board of the assistant train master's office for nearly three weeks before the accident that "All trains will run slow between Sugar Loaf Switch and South Sugar Loaf, account track settling." It was the duty of deceased to examine this bulletin board before starting and at the end of each run, that is, six times every day that the notice was up, and the inference is irresistible that he must have seen it. But beyond this there is the positive testimony of the fireman that the deceased had a copy of the order which he showed to witness. There was further evidence that running slow meant eight to ten miles an hour, and that at that speed the accident would not have happened, or at most would not have had any serious results.

It is true that an effort was made by plaintiff to show that the notice was not posted until after the accident, but the evidence

could hardly be said to amount to a scintilla. A single witness, the engineer of a shifting engine, was called to this point in rebuttal, but his testimony cannot fairly be said to go further than that he did not see the notice until after the accident.

It is further said that the testimony as to the posting of the notice and the deceased's knowledge of it was by witnesses for the defense and their credibility was for the jury. Such certainly is the general rule. The jury are not bound to believe every story that a witness or witnesses are willing to swear to simply because no other witness contradicts it. If its inherent improbability or irreconcilability with facts shown or admitted are such that it does not command their assent, the jury may disregard it. But this rule is founded on common sense and knowledge of human nature, and must be limited by the same standards. When the testimony is not in itself improbable, is not at variance with any proved or admitted facts, or with ordinary experience, and comes from witnesses whose candor there is no apparent ground for doubting, the jury is not at liberty to indulge in a capricious disbelief. If they do so, it is the duty of the court to set the verdict aside. Such cases are exceptional, but this is one of them. The fact that the notice was there for three weeks in a place where it was the daily duty of the deceased to look, was not denied except inferentially by one witness; the coemployees of the deceased saw it, and when the fireman testified that the deceased had shown him a copy of it, he merely added positive testimony to what was already an irresistible inference from facts previously proved. The verdict should have been set aside as in direct disregard of the evidence, and where that is the case, the court may refuse to submit it at all and direct a verdict accordingly: *Holland v. Kindregan*, 155 Pa. 156.

On a review of the whole evidence the facts are practically undisputed and from them it clearly appears that Lonzer's death was the direct and proximate result of his voluntary disregard of an order of the appellant made specially to avoid the very danger from which the accident resulted. Under such circumstances there could be no recovery by him or by anybody claiming through him.

*Judgment reversed.*<sup>1</sup>

<sup>1</sup> Compare *Union Pacific Ry. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 S. Ct. 619; *Tedder v. Fraleigh-Lines-Smith Co.*, 55 Fla. 496, 46 So. 419; *Marshall v. Grosse Clothing Co.*, 184 Ill. 421, 56 N. E. 807; *Wellington v. Corinna*, 104 Me. 252, 71 Atl. 889, holding that a verdict may be directed for the plaintiff although the defendant has interposed a negative plea. But see *Commonwealth v. McNeese*, 156 Mass. 231, 30 N. E. 1021; *Perkiomen R. R. Co. v. Kremer*, 218 Pa. 641, 67 Atl. 913. — Ed.



SHARE *v.* COATS.

SUPREME COURT OF SOUTH DAKOTA. 1912.

[Reported 29 *South Dakota*, 603.]

SMITH, J. . . . At the close of plaintiff's evidence, defendant moved for direction of a verdict, which was denied and exception taken. Defendant then rested, without offering any evidence, and, upon plaintiff's motion, a verdict was directed for plaintiff for the full amount of commissions claimed on both sales, to which defendant excepted.<sup>1</sup> . . .

The record shows that at a time when all the evidence offered was before the court and jury each party presented a motion for direction of a verdict. It has been long settled in this state that when each party, at the close of all the evidence, presents a motion for direction of a verdict this, in effect, is a submission of questions, both of law and fact, to the court. *Bower v. Jones*, 26 S. D. 414, 128 N. W. 470; *First National Bank v. North*, 2 S. D. 480, 51 N. W. 96; *Erickson v. Citizens' Nat. Bank*, 9 N. D. 81, 81 N. W. 46. The trial court has power, even in cases where a jury trial is a matter of legal right, to direct a verdict, when requested by both parties. *People v. Scannell*, 172 N. Y. 316, 65 N. E. 165. This rule is unquestionably sustained by the weight of authority. 38 Cyc. 1576 (c), and cases cited. Appellant's contention is that defendant's motion for direction of a verdict challenged only the *legal sufficiency* of the evidence to sustain a verdict for plaintiff, conceding the testimony of plaintiff's interested witness to be absolutely true; and that the credibility of plaintiff's testimony was not thereby submitted to the trial court, but remained a question upon which defendant was entitled to a verdict of the jury. Appellant's line of reasoning has been adopted in states whose courts have expressly disapproved the New York rule. *Thompson v. Brennan*, 104 Wis. 564, 80 N. W. 947; *National Cash Register Co. v. Bonneville*, 119 Wis. 222, 96 N. W. 558; *German Saving Bank v. Bates*, 111 Iowa, 432, 82 N. W. 1005; *Wolf v. Chicago Sign Printing Co.*, 233 Ill. 501, 84 N. E. 614, 13 Ann. Cas. 369; *Stauff v. Bingenheimer*, 94 Minn. 309, 102 N. W. 694; *Poppitz v. German Ins. Co.*, 85 Minn. 118, 88 N. W. 438; *Lonier v. Ann Arbor Savings Bank*, 153 Mich. 253, 116 N. W. 1086. The reasoning of these cases as stated in *Stauff v. Bingenheimer*, *supra*, is: That "a mo-

<sup>1</sup> A part of the opinion is omitted. The judgment of the trial court was reversed for error in regard to the amount of the verdict. — Ed.

tion by either party to an action that a verdict be directed in his favor cannot be construed as a waiver of the right to have the facts passed upon by the jury, or as an agreement to submit them to the trial judge, in case the motion is denied." The reasoning upon which the New York rule is founded is that parties have the right to waive a jury trial; and that motions by both parties for direction of a verdict is sufficient evidence of an intention to waive that right. The latter rule has been too long acted upon and settled in this state to warrant the adoption of the rule contended for by appellant.

It has never been held in this state, however, that motions by both parties constitute a conclusive waiver of the right to demand a submission to the jury of questions of fact which may properly arise upon the evidence, where the contrary intention of the parties not to submit questions of fact to the court may be evidenced by a seasonable request that the facts be submitted to the jury. It is held in New York that a request for a submission of facts to the jury, where the evidence is of such character as to require it, may be made at any time before a directed verdict is returned by the jury. *Eldredge v. Mathews*, 93 App. Div. 356, 87 N. Y. Supp. 652; *Maxwell v. Martin*, 130 App. Div. 80, 114 N. Y. Supp. 349; *Fuller v. Schrenk*, 58 App. Div. 222, 68 N. Y. Supp. 781, affirmed in 171 N. Y. 671, 64 N. E. 1126. It is also held that a request for submission of questions of fact to the jury should specifically point out the matters it is desired to have submitted. *Mayer v. Dean*, 115 N. Y. 556, 22 N. E. 265, 5 L. R. A. 540. Such a request will not be granted after the rendition of the directed verdict. *Persons v. Hawkins*, 41 App. Div. 171, 58 N. Y. Supp. 831; *Strohm v. Zoellner*, 61 Misc. Rep. 56, 112 N. Y. Supp. 1063. The reason for the rule giving parties the right to submit questions of fact to the jury upon request, after an adverse ruling upon a motion for a directed verdict, is that every party is entitled to present to the court such legal questions as he thinks arise upon the testimony, without the penalty of losing his right to have the jury pass upon evidence which comes from interested witnesses, or is of such character that honest men might differ in the conclusions to be drawn therefrom. Otherwise, it is said, it would never be safe to ask for direction of a verdict. *Switzer v. Norton*, 3 App. Div. 173, 38 N. Y. Supp. 350. It is apparent, therefore, that a party, desirous of preserving his right to have the jury pass upon the evidence, where it is of such character as to be properly submitted to a jury, may preserve that right by a reasonable and

proper request, after the motions for directed verdicts have been ruled upon by the court. Such request would ordinarily be a conclusive rebuttal of the presumption that, by motions for directed verdicts, the parties intended to submit questions of both law and fact to the court. Under the rule adopted by this court, however, when no such request is made, the presumption that parties intended to submit to the court all questions, both of law and fact, becomes conclusive.

An exception to an order directing a verdict presents no question for review, except the legal sufficiency of the evidence to sustain the verdict directed. Questions of credibility of witnesses, and of inferences to be drawn from evidence, are deemed submitted to the court by motions of both parties; and the directed verdict has like effect as does a verdict returned by the jury. *Sundling v. Willey*, 19 S. D. 293, 103 N. W. 38, 9 Ann. Cas. 644; *Farmen v. U. S. Express Co.*, 25 S. D. 96, 125 N. W. 575. In the case at bar, the defendant excepted to the order of the trial court directing a verdict for plaintiff; but this exception presents for review nothing except the legal sufficiency of the evidence to sustain the verdict, and cannot be deemed an exception to a denial of his request to go to the jury upon the evidence, for the plain reason that no such request was made. *Ormes v. Dauchy*, 82 N. Y. 443, 37 Am. Rep. 583.<sup>1</sup> . . .

### GAGNON *v.* DANA *et al.*

SUPREME COURT OF NEW HAMPSHIRE. 1897.

[Reported 69 *New Hampshire*, 264.]

CASE, for personal injuries resulting from the fall of a staging at the Sacred Heart Hospital, in Manchester, occasioned by the breaking of an unsound and decayed bracket. Verdict for the plaintiff.

The plaintiff is a carpenter of many years' experience and fully understood all the duties and risks incident to that employment, one of which is the putting up of wall brackets to support the staging on which he is to work.

<sup>1</sup> See also *Beuttell v. Magone*, 157 U. S. 154, 39 L. ed. 654, 15 S. Ct. 566; *Empire State Cattle Co. v. Atchison, etc.*, Ry. Co., 210 U. S. 1, 52 L. ed. 931, 28 S. Ct. 607, 15 Ann. Cas. 70; *Bankers' Surety Co. v. William Miller & Sons Co.* (Ark., 1912), 150 S. W. 570; *People v. Scannell*, 172 N. Y. 316, 65 N. E. 165; *King v. Cox*, 126 Tenn. 553, 151 S. W. 58; *Fitzsimons v. Richardson, Twigg & Co.*, 86 Vt. 229, 84 Atl. 811. — Ed.

The work on the hospital was being done by one Bradley, the owner of the property, who employed one Gay to superintend the work, hire and pay the men, and buy the materials. In the performance of these duties, Gay went to the defendants and engaged St. Lawrence, their superintendent, and all the other men in their employ, one of whom was the plaintiff, under an arrangement by which the defendants were to receive the same wages the men were then receiving, and twenty-five cents a day additional for each man furnished by them; and the men went to work on the hospital accordingly. The defendants were not employed on the building and had nothing to do with it aside from the letting of their men.

By Gay's direction, St. Lawrence acted as foreman of all the men on the job, and kept their time and reported the same to Gay, who kept the pay-roll, paid the men directly hired by him, and also paid the defendants in a lump sum for the men furnished by them.

Not having a sufficient number of wall brackets for stagings, Gay subsequently borrowed of the defendants about ninety of their brackets, which were used by the men on the job. These brackets were loaned to Gay gratuitously and merely as an accommodation to him; and the loan had nothing to do with the original contract of hiring the defendants' men.

The staging on which the accident happened was built by the plaintiff and one Dana, a fellow-workman. It was about fourteen feet from the ground, and in front of a bay window. The brackets were placed on the building at each side of the window, and a plank about a foot wide, two inches thick, and fourteen feet long, made the staging. The plank touched the window, and was on the outside part of the bracket within six inches of the end of it. While Dana and the plaintiff were on the plank, one of the brackets broke at a point just outside the brace, and the plaintiff fell to the ground, stunned and seriously injured. He testified that the staging looked all right.

Several witnesses for the plaintiff testified that they heard the defendant Dana say soon after the accident that he knew some of the brackets were old and unsound, and that he told St. Lawrence to pick them out and not to use them. This was denied by Dana and by St. Lawrence; and Dana further testified that he knew of no unsoundness in the brackets when they were loaned.

At the close of the plaintiff's evidence, a motion for a nonsuit was denied, subject to exception. At the close of all the evidence,



the motion was renewed by the defendants, who also moved that a verdict be directed for them. The motions were denied, and the defendants excepted. . . .

BLODGETT, J.<sup>1</sup> . . . The defendants can take nothing by their exceptions to the denial of their motions for a nonsuit and to direct a verdict in their favor. If at the time the plaintiff rested he had not adduced competent evidence to sustain a verdict in his favor (as to which no intelligent opinion can be expressed without additional facts), it is now immaterial because the defendants, instead of risking their case upon their exception to the denial of their motion for a nonsuit, went on with the trial and introduced their evidence, and the deficiency, if any, of the plaintiff's evidence was supplied by one side or the other before the case went to the jury, inasmuch as it is found that at some stage of the trial there was testimony from numerous witnesses to and against the defendants' knowledge of the bracket's defective and unsound condition; so that when all the proof was in the case, there was no ground of exception for the reason of its insufficiency to sustain a verdict for the plaintiff, and this being so, it is wholly indifferent by which party the proof was introduced. *Fletcher v. Thompson*, 55 N. H. 308, 309, and authorities cited; *Oakes v. Thornton*, 28 N. H. 44, 47 (per Woods, J.). And this testimony also rendered the renewal of the motion at the close of the evidence unseasonable (*Brown v. Insurance Co.*, 59 N. H. 298, 307), and precluded the granting of the motion to direct a verdict for the defendants. *Shepardson v. Perkins*, 58 N. H. 354, 355.

The result is that the defendants' exceptions on this branch of the case are overruled, and their other exceptions hereinbefore considered sustained. *Verdict set aside.*<sup>2</sup>

CLARK, J., did not sit: the others concurred.

<sup>1</sup> A part of the statement of facts and a part of the opinion are omitted. — ED.

<sup>2</sup> *Weber v. K. C. Cable Ry. Co.*, 100 Mo. 194, 12 S. W. 804, 13 S. W. 587, 7 L. R. A. 819; *Burnham v. Concord R. R.*, 69 N. H. 280, 45 Atl. 563, *accord*.

The court's refusal to direct a verdict for the defendant at the close of the plaintiff's evidence does not preclude the direction of such a verdict at the close of all the evidence. *McDermott v. Burke*, 256 Ill. 401, 100 N. E. 168. — ED.

## SPENCER v. THE STATE OF NEW YORK.

COURT OF APPEALS OF NEW YORK. 1907.

[Reported 187 *New York*, 484.]

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 16, 1906, affirming a judgment in favor of plaintiff entered upon an award of the Court of Claims.

The nature of the action and the facts, so far as material, are stated in the opinion.

HISCOCK, J.<sup>1</sup> While plaintiff was at work for defendant around one of its canal bridges, in the city of Rochester, he was struck and injured by a plank which was thrown down upon him from the elevated bridge by one Patterson, who was a bridgetender, and for the damages resulting from such injuries he has recovered judgment.

It is urged in behalf of the appellant that at the time Patterson injured the respondent, he was engaged in an enterprise of his own and was not in any degree whatever acting within the scope of his employment so as to render the state liable for his misconduct, and that, therefore, the plaintiff should have been nonsuited upon the trial. We think that there would be great force in this contention if the appellant were in position to make it, but as the case is presented upon appeal this question is not available.

If the appellant's contention is correct, then there was no evidence upon which the Court of Claims could render judgment in favor of the plaintiff, and his complaint should have been dismissed as a matter of law upon a motion for a nonsuit. Such motion was duly made at the close of the plaintiff's case and denied. Defendant then proceeded to offer evidence upon its behalf and at the close of all the evidence the motion for a nonsuit was not renewed, but the case was submitted to the court for consideration, and thereafter what amount to findings of fact were made and judgment rendered. In fact, the request made at the close of all the evidence by the deputy attorney-general that the court should "Find that it was no part of Mr. Patterson's duty to be on this bridge and he was not in any sense acting as the officer, agent or servant of the State in doing what he did do that caused the injury," seems almost to imply the idea of a question of fact to be passed upon. Certainly it was not fairly a motion for a nonsuit,

<sup>1</sup> A part of the opinion is omitted. — Ed.

and no ruling was made and consequently no exception taken which would enable this court to pass upon the rights of the defendant as they then stood.

It is well settled that upon a trial the defendant may supply deficiencies in plaintiff's proof, and that in courts of record at least, the failure to renew or make a motion for a nonsuit at the close of all the evidence will be regarded as an admission that there is some question of fact to be passed upon and a waiver of the right to have the complaint and case dismissed as a matter of law. *Jones v. Union Ry. Co.*, 18 App. Div. 267; *Griffith v. Staten Island R. T. R. Co.*, 89 Hun, 141; *Hobson v. N. Y. Condensed Milk Co.*, 25 App. Div. 111; *Barrett v. Third Ave. R. R. Co.*, 45 N. Y. 628. . .

These views lead to the conclusion that without consideration of its merits the judgment appealed from must be affirmed, with costs.<sup>1</sup>

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT and HAIGHT, JJ., concur; WILLARD BARTLETT, J., concurs in result; CHASE, J., not sitting.  
*Judgment affirmed.*

## YOUNG, Administratrix, *v.* CENTRAL RAILROAD COMPANY OF NEW JERSEY.

SUPREME COURT OF THE UNITED STATES. 1914.

[Reported 232 *United States*, 602.]

WHITE, C. J. As administratrix of the estate of her deceased husband, the plaintiff in error sued to recover for the loss occasioned by his death alleged to have resulted from the negligence of the defendant railroad company. Over the objection of the defendant the case was submitted by the trial court to the jury and from the judgment entered on the verdict rendered against the railroad company, error was by the company prosecuted from the Circuit Court of Appeals. On the hearing that court concluding that the evidence did not justify the submission of the case to the jury, reversed the judgment and in passing upon a motion made by the railroad company in the trial court, pursuant to the Penn-

<sup>1</sup> *Columbia R. R. Co. v. Hawthorne*, 144 U. S. 202, 36 L. ed. 405, 12 S. Ct. 591; *Joliet, A. & N. Ry. Co. v. Velie*, 140 Ill. 59, 29 N. E. 706; *Barnbasz v. Kubat*, 91 Md. 53, 46 Atl. 337; *Goss v. Calkins*, 162 Mass. 492, 39 N. E. 469; *Hall v. Wakefield, etc., Ry. Co.*, 178 Mass. 98, 59 N. E. 668, *accord*. See Wigmore, *Evidence*, sec. 2496. — Ed.

sylvania practice for judgment in its favor *non obstante veredicto* it was held that the motion was well taken and the case was remanded to the trial court not for a new trial, but with directions to enter a judgment for the defendant. (200 Fed. Rep. 359.) As a case as made by the pleadings depended not merely upon diverse citizenship, but was expressly based on the Employers' Liability Act, error was prosecuted from this court.

We shall not undertake to analyze the evidence or review the grounds which led the court below to conclude that error was committed in submitting the case to the jury, because we think it is adequate to say that after a careful examination of the record we see no reason for holding that the court below erred in so deciding. As regards however, the ruling on the motion for judgment *non obstante veredicto*, it is apparent in view of the recent decision in *Slocum v. Insurance Company*, 228 U. S. 364, that error was committed. It follows that our duty is to affirm and modify; that is, to affirm the judgment of reversal and to modify by reversing so much of the action of the court below as directed the entry of a judgment in favor of the defendant. Conformably to this conclusion it is ordered that the judgment of reversal be, and the same is hereby affirmed, and that the direction for entry of judgment in favor of defendant be reversed and the case is remanded to the trial court with directions to set aside its judgment and grant a new trial.

*Affirmed and modified.*

BOTHWELL, Administrator, v. BOSTON ELEVATED  
RAILWAY COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1913.

[Reported 215 *Massachusetts*, 467.]

TORT under St. 1907, c. 392, for the death of William J. Bothwell, caused by his being run into by a car of the defendant on Washington Street in that part of Boston called Roslindale, and alleged to have been due to negligence of the motorman of the car. . . .

The jury found for the plaintiff in the sum of \$5,000; and the defendant alleged exceptions.

RUGG, C. J. . . .<sup>1</sup> It is urged by the defendant that this is a proper

<sup>1</sup> A part of the statement of facts is omitted together with a part of the opinion in which the evidence was examined and held to show contributory negligence, and in which it was held that the defendant's request that a verdict be directed in his favor should have been granted. — Ed.



case for this court to exercise the power vested in it by St. 1909, c. 236, and to direct by its rescript that judgment be entered for the defendant. The case appears to have been fully and fairly tried with an intelligent appreciation by counsel on each side of the issues involved and of the principles of law applicable to it, and its merits on the ample report of the evidence contained in the exceptions seem plain. Therefore it appears to be a case where the statute properly may be invoked. *Archer v. Eldredge*, 204 Mass. 323, 327. *Grebenstein v. Stone & Webster Engineering Corp.*, 205 Mass. 431, 440. *Newhall v. Enterprise Mining Co.*, 205 Mass. 585. *Burke v. Hodge*, 211 Mass. 156, 163.

This course would be followed without discussion but for the decision of *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, which holds that "the right of trial by jury" secured by art. 7 of the Amendments to the Constitution of the United States does not permit the entry, after a verdict in favor of one party, of a judgment for the opposing party under circumstances like those in the case at bar. The question there arose in reviewing the action of the Circuit Court of Appeals which, under the conformity act (U. S. Rev. Sts., § 914) and following a Pennsylvania statute, had entered judgment in favor of the party for whom the trial court erroneously refused to direct a verdict. The substance of that decision is that it is an unconstitutional exercise of the power of legislation to authorize the entry of judgment in a case where a trial by jury has been had, except in conformity to the verdict, and that, although the error committed by the trial court may consist solely in its refusal to direct a verdict in favor of one party, yet after a verdict wrongly rendered in favor of the adverse party as the direct result of such erroneous refusal, the only method for correcting that error within the reach of the legislative or judicial departments of government is to order a new trial, and this because of the scope of the meaning of "trial by jury," as secured by the Seventh Amendment to the Federal Constitution. That decision is not a final or binding authority on this court, for the reason that the Seventh Amendment does not control the action of the several States in abridging trial by jury within their own jurisdiction. It applies only to the courts and Congress of the United States. *Pearson v. Yewdall*, 95 U. S. 294, 296. *Twining v. New Jersey*, 211 U. S. 78, 98. The decision of *Slocum v. New York Life Ins. Co.* was rendered by a bare majority of a divided court, four of the justices, among whom is a former chief justice of this court, joining in a dissenting opinion. But the deference due to a decision by

the highest court of the nation when it challenges the constitutionality of our statute (as it does because our own constitution secures the right of trial by jury) renders necessary thorough consideration, even though our statute has been acted upon heretofore in numerous instances without question of its validity.

The substance of our statute is that in civil cases where at the trial a request has been made that on all the evidence a finding or verdict be returned for either party, and such request has been denied and a finding or verdict has been rendered contrary thereto, and it shall be held by this court on exceptions that such request should have been granted, then (if all exceptions by the prevailing party shall be overruled) this court may by rescript direct the entry in the trial court of judgment for the party in whose behalf the request for the finding or verdict was made and erroneously refused. Before the statute of 1909 no such power resided in any of our courts. The practice is stated with clearness in *Smith v. Lincoln*, 198 Mass. 388, where it was held that after a verdict the only power of the trial judge was to set aside the verdict. The aim of the act is plain both from its provisions and its title, "To provide for expediting the final determination of causes." However laudable the design for preventing delays in the administration of justice, it can be exercised only in accordance with the limitations imposed by the constitution. Article 15 of the Declaration of Rights of our Constitution provides: "In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practised, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the Legislature shall hereafter find it necessary to alter it." This article has been discussed in numerous cases. It has been held that the Legislature may regulate the mode in which the right shall be exercised and that such regulation does not impair the substance of the right. This rule has been applied to statutes requiring as a condition precedent to the trial an affidavit of defense, *Hunt v. Lucas*, 99 Mass. 404; the filing of a claim for a trial by jury in order to prevent waiver of the right, *Foster v. Morse*, 132 Mass. 354; appeal from decision of tribunal without a jury, *Kenney's case*, 108 Mass. 492; the giving of bail and security for costs on appeal from trial before a magistrate, *Jones v. Robbins*, 8 Gray, 329, 341, *Hapgood v. Doherty*, 8 Gray, 373; and to statutes changing the rule as to challenges of jurors, *Commonwealth v. Dorsey*, 103 Mass.

412; the qualifications of jurors, *Commonwealth v. Wong Chung*, 186 Mass. 231, *Commonwealth v. Worcester*, 3 Pick. 462, and the weight to be given to evidence, *Holmes v. Hunt*, 122 Mass. 505, 516; and restricting the right of the trial judge to set aside a verdict to cases where motion therefor is made and to reasons stated, *Peirson v. Boston Elevated Railway*, 191 Mass. 223, 229, *Loveland v. Rand*, 200 Mass. 142, *James v. Boston Elevated Railway*, 213 Mass. 424. See *Commonwealth v. Barry*, 9 Allen, 276.

On the other hand it has been said that trial by jury implies power of the judge to set aside a verdict and grant a new trial, which cannot be impaired by the Legislature. Opinion of the Justices, 207 Mass. 606. *Capital Traction Co. v. Hof*, 174 U. S. 1.

None of these cases are decisive of the point now presented. It becomes necessary to consider the nature of the trial by jury secured by our Constitution. There was great diversity in the form of jury trial existing in the several States at the time of the adoption of the Constitution of the United States. This is discussed with fecundity of illustration by Hamilton in No. 83 of the *Federalist*. Plurality of jury trials in Massachusetts in the same case there is referred to. Indeed, this variety of custom between the States has been said to have been the reason why no article securing trial by jury in civil cases was inserted in the Constitution by the convention which framed it. 5 *Elliot's Debates*, 550.

The trial by jury preserved by our Constitution is the common law trial by jury in its essential characteristics as known and understood at the time the Constitution was adopted. *Commonwealth v. Anthes*, 5 Gray, 185, 229. It did not mean to preserve the minor details or unessential formalities of the trial by jury as it then existed either in England or here. That is plain both on reason and authority. Trial by jury in some form had existed since the early settlement of this State. Modifications of the system as practised in the mother country had grown up by custom and by legislation in the Colony and Province of Massachusetts Bay. It is not to be thought that the framers of our Constitution in 1780, performing their labors in the midst of the War of the Revolution, had in mind the system of the mother country rather than that with which they were familiar by daily observation. As we understand, the substance of trial by jury in England and in Massachusetts was the same although there were differences of detail. *Parker v. Simpson*, 180 Mass. 334, 355. If, however, essential differences existed, it seems to us not open to debate that the trial



by jury known and practised in this State at the time the Constitution was framed and adopted was the one meant by art. 15 of our Declaration of Rights. It was pointed out with ample reference to the statutes by Mr. Justice Story in *United States v. Wonson*, 1 Gall. 5, that both in the colonial and provincial periods of the history of our Commonwealth two trials by jury upon the same issues in the same case often were permissible as of right, one in the court of first instance and one in the appellate court. This continued to be the law until after the ratification of the Federal Constitution. St. 1782, c. 11, §§ 2, 5; c. 14, § 3. St. 1784, c. 28, § 8. It has never been suggested, so far as we are aware, that this double jury trial was one of the incidents of the constitutional right of our citizens. Under our practice trial by jury in its constitutional sense does not include all the features which attach to the right in England. This is pointed out in *Simmons v. Fish*, 210 Mass. 563, 569, where one difference touching the scope of a new trial is discussed. Our cases there are reviewed at length and it is shown that a new trial in this State (contrary to the established law of England) has been construed not to require a new trial of all the issues raised by the pleadings when in law and in the exercise of sound sense it appears that the issue as to which alone error was committed in the trial is wholly separable from those as to which a full and fair trial in law was had and may with entire justice and a jealous regard to the rights of all parties, both in their strictly legal aspects and in the practical phases likely to arise in a jury trial, be submitted as a separate and distinct matter to be determined by a new jury. This power is exercised with caution. But its existence does not impair in any of its essential features the right of trial by jury which the Constitution commands to be held sacred. See *Randall v. Peerless Motor Car Co.*, 212 Mass. 352, 392; 25 Ann. Cas. 588, and cases collected.

It was a part of common-law trial by jury that the plaintiff might become nonsuited as of right at any time before verdict if not before judgment. *Derick v. Taylor*, 171 Mass. 444, and cases there collected. 2 Tidd's Pract. 867. *Haskell v. Whitney*, 12 Mass. 47, and cases cited in note at p. 49. But as early as 1820 it was decided that in this Commonwealth apparently as a practice long existing a plaintiff had no such right after the case was opened to the jury. *Locke v. Wood*, 16 Mass. 317. See *Carpenter & Sons Co. v. New York, New Haven, & Hartford Railroad*, 184 Mass. 98. It is pointed out both in the opinion and in the dissent in *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, that there is no novelty



in a judgment being given at common law without a verdict by a jury for that was accomplished by a demurrer to evidence. *Copeland v. New England Ins. Co.*, 22 Pick. 135. It is stated that our statutes make simpler provision for reaching the result available by that common-law method. *Golden v. Knowles*, 120 Mass. 336. There are other similar instances. It is laid down in 2 Tidd's Pract. 900 (a work of undoubted authority as to common law) as a principle of jury practice at common law that "It sometimes happens that a point is reserved, or saved by the judge at *nisi prius*, with liberty to apply to the court for a nonsuit or verdict; in which case, the court has been in the habit of considering itself in the situation of the judge, at the time of the objection raised; and a nonsuit or verdict is entered according to their determination, without subjecting the parties to the delay and expense of a new trial." Numerous cases there are cited where such practice has been adopted, the following being the most pertinent: *Cox v. Kitchin*, 1 B. & P. 338; *Attwood v. Small*, 1 Man. & Ry. 246, 261 (a); *Mead v. Robinson*, Barnes's Notes, 451; *Kemp v. The Hundred of Strafford*, Barnes's Notes, 455. Judgment appears not infrequently to have been entered by order of the appellate court upon special case stated. See for example *Wright v. Cartwright*, 1 Burr. 282; *Atkin v. Barwick*, 1 Strange, 165; *Coppendale v. Bridgen*, 2 Burr. 814. This practice seems to have been followed in New York in some instances, *Holmes v. D'Camp*, 1 Johns. 34; *Hatten v. Speyer*, 1 Johns. 37; and perhaps rested in many instances on consent. 2 Tidd's Pract. 898. This is akin to our practice on a case stated. *Massachusetts National Bank v. Bullock*, 120 Mass. 86.

A somewhat analogous practice is described at length in *Treacher v. Hinton*, 4 B. & Ald. 413, 416, 417, in the compulsory nonsuit by the judge, giving the plaintiff liberty to move for a verdict in his favor, which, if subsequently ruled to have been required by law, then might be entered to be as effective as if pronounced by the jury. This case, decided in 1821, states apparently a well understood and ancient common law practice, no doubt in existence at the time of the adoption of our Constitution. Illustrations of this practice are to be found in *Hobbs v. London & Southwestern Railway*, L. R. 10 Q. B. 111, 113, 125; *Reed v. Kilburn Coöperative Society*, L. R. 10 Q. B. 264. See 26 Harv. Law Rev. 732. It has not been commonly supposed that in England any impairment of the vitals of trial by jury has been wrought by modern statutes. See 8 Am. Law Rev. 256, 274. Yet a practice similar to that pre-

scribed by our statute exists there. *McGuire v. Western Morning News Co.*, [1903] 2 K. B. 100, 113.

In view of all these considerations we are of opinion that St. 1909, c. 236, is not a violation of the right to a trial by jury secured by our Constitution. The falling into disuse of the two trials, which existed in many instances as of right in this Commonwealth at the adoption of the Constitution, within half a century thereafter, is evidence to this conclusion. This is confirmed by the early denial to the plaintiff of the right to become nonsuited after the evidence was in. It is supported by the common law practice to which reference has been made.

The essence of trial by jury is that controverted facts shall be decided by a jury. The constitutional right to trial by jury is preserved in this regard when each party has one fair opportunity to present to a jury the evidence on which he claims to raise an issue of fact. If he fails utterly to improve that opportunity, there is no constitutional guaranty that he shall be given another chance. He has had his day in court. One feature of ideal administration of justice by the jury system is that correct rulings of law shall be made by the presiding judge. If the record is so framed and preserved that the same result may be reached at a later time as would have been attained by such correct rulings at the trial that end is attained by constitutional means. The function of the jury is to pass upon the facts involved in an action. The statute now under review does not infringe upon this province in any degree. A trial judge always has had power to direct a verdict provided the law required it. The statute simply permits that to be done by this court which ought to have been done at the trial. The hypothesis by which alone it permits the order to be made is that at the trial no question of fact was in truth presented, but only one of law which the court should have ruled as such. It does not disturb the plain boundary between fact which a jury must determine and law which the court must rule. It permits the right ruling to be given at a time later than that at which it should have been made when no substantial rights have accrued in the meantime.

We are of opinion that the history of our practice as to trial by jury both before and since the adoption of the Constitution shows that the trial by jury of our Constitution has slightly more flexibility in its adaptation of details to the changing needs of society without in any degree impairing its essential character than is ruled by the majority of the court in *Slocum v. New York Life Ins. Co.* We are constrained not to adopt the reasoning or the con-

clusion of that opinion as correctly defining the scope of legislative power under our Constitution. St. 1909, c. 236, is not in violation of our Constitution. This result is in harmony with the decisions of many other courts.<sup>1</sup> We do not rest this judgment upon their authority, however, for we have not undertaken the historical study of the several constitutional provisions under which they have arisen to determine their weight.

The defendant's exceptions are sustained, and in accordance with St. 1909, c. 236, judgment is to be entered in the Superior Court for the defendant and rescript is to go to that effect.

*So ordered.*<sup>2</sup>

<sup>1</sup> *Anderson v. Fred Johnson Co.*, 116 Minn. 56. *Muench v. Heinemann*, 119 Wis. 441, 448. *Hay v. Baraboo*, 127 Wis. 1. *Cornette v. Baltimore & Ohio Railroad*, 115 C. C. A. 61. *Bailey v. Willoughby*, 33 Okla. 194. *McVeety v. Harvey Mercantile Co.*, 139 N. W. Rep. 586. *Fishburne v. Robinson*, 49 Wash. 271. *Roe v. Standard Furniture Co.*, 41 Wash. 546. *Cruikshank v. St. Paul Fire & Marine Ins. Co.*, 75 Minn. 266. *Dalmas v. Kemble*, 215 Penn. St. 410. *American Car & Foundry Co. v. Alexandria Water Co.*, 221 Penn. St. 529. *Manning v. Orleans*, 42 Neb. 712. *Smith v. Jones*, 104 C. C. A. 329. *Fries-Breslin Co. v. Bergen*, 99 C. C. A. 384. *Carstairs v. American Bonding & Trust Co.*, 54 C. C. A. 85. *Riehmir v. Andrews & Gale Elevator Co.*, 11 No. Dak. 453.

<sup>2</sup> For a criticism of *Sloeum v. New York Life Ins. Co.*, 228 U. S. 364, 57 L. ed. 879, 33 S. Ct. 523, cited in the principal case, see an article on "Trial by Jury in United States Courts" by J. L. Thorndike, Esq., in 26 Harv. L. Rev. 732.

As to the power of the court to compel obedience to its peremptory instruction to find a verdict for one of the parties, see *Grimes Dry Goods Co. v. Malcolm*, 164 U. S. 483, 41 L. ed. 524, 17 S. Ct. 158; *Van Ness v. Van Ness*, Fed. Cas. No. 16, 869; *Cahill v. Chicago, M. & St. P. Ry. Co.*, 20 C. C. A. 184, 74 Fed. 285; *Cloquet Lumber Co. v. Burns*, 124 C. C. A. 600, 207 Fed. 40; *Curran v. Stein*, 110 Ky. 99, 60 S. W. 839; *Pardee v. Orvis*, 103 Pa. 451.

In *Curran v. Stein*, *supra*, the court said: "It is insisted for appellant that the court erred in giving the jury a peremptory instruction, or in interfering with the freedom of their deliberation by requiring them to return a verdict which they were unwilling to render. There was no error of the court in requiring the jury to obey his instructions. The peremptory instruction of the court to the jury, like any other order the court may make in the case, must be obeyed. The verdict, though in form the act of the jury, is really the act of the court. The court determines the case. The verdict of the jury is merely a form of putting of record the judgment which the court has given. To hold that the jury may disobey the peremptory direction of the court would be to vest the jury with power to review the decision of the court on the law of the case. In some jurisdictions the practice is for the court to discharge the jury and enter the judgment. The substance is the same when the jury find a verdict by the peremptory direction of the court. It is proper that the verdict, as in this case, should show on its face that it is made under the order of the court, for this relieves the jury of all responsibility for it."

—ED.

## SECTION VII.

*Argument and Conduct of Counsel.*SODOUSKY, *etc.* v. MCGEE.

COURT OF APPEALS OF KENTUCKY. 1830.

[Reported 4 *J. J. Marshall*, 267.]

ROBERTSON, C. J.<sup>1</sup> The appellants (nine in number) have assigned various errors in a judgment obtained against them, for \$100, by the appellee, in a joint action of assault and battery, instituted against them and four others. Two of the appellants pleaded justification severally. Some of them pleaded not guilty, jointly, and some not guilty, severally. Several counsel were engaged in the defense, some of them representing several of the defendants to the action jointly, and some appearing for other defendants severally and alone. . . .

Jacob Sodousky, who had filed a separate plea of not guilty, expressed a wish to be heard before the jury by his counsel; but he was not allowed to be thus heard, because "there were two other attorneys permitted to argue the cause before the jury, who were employed by his co-defendants, but who were not employed by him (said Jacob)." . . .

The circuit court did not err in not permitting Jacob Sodousky to be heard by his counsel. It does not appear that any other counsel who was heard, represented him, nor that his counsel, who represented others also, was heard in behalf of those others; if he had been, there could be no ground for complaint, because he was not entitled to more than one speech, merely because he appeared for several defendants.

Every person has a legal, as well as a natural right to be heard in his own cause; and no rule of practice can deprive him of that right, if, at a proper time, and in a proper manner, he proposes to exercise it. It is a rule of practice in the courts of this state, to permit two, and only two counsel to speak on each side in civil cases; this is sufficiently liberal. The number might be reduced to one, and there could be no just complaint; all that a party can demand is, that he shall be heard by himself, or by his counsel. He cannot claim the right to be heard by a multitude of counsel, or by more than one representative. And if there be a plurality of co-plaintiffs, as their right or cause of action is joint, and they

<sup>1</sup> A part of the opinion is omitted. — ED.



voluntarily unite in bringing suit, they must be considered as one person, and cannot, therefore, individually, demand as a matter of right to be heard by more than one counsel. But a plaintiff may sue whom he wills to sue. He may bring a joint suit against several, against some of whom he has no cause of action. They have not voluntarily united themselves in the action. They may be alien and hostile to each other; their interests may be diverse and repugnant to each other; some may combine to escape, and to throw the burden on the others. Some may, therefore, employ counsel in whom others have no confidence, and therefore, will not employ, and who may be paid to oppose the rights of those others. Suppose three defendants in an action of trespass employ, severally, three counsel; each defendant being hostile to the defense of his co-defendants, and the counsel of each being, of course, opposed to the right of those on whom he was employed to endeavor to throw the burden of the action. After two of the defendants had been heard by their counsel, should the other be disfranchised and compelled to be "dumb" "like the sheep before the shearers?" Surely he would have a clear and undeniable right to be heard. The court has no right, in such a case, to restrict the number of counsel to two. The parties might consent that some two of their several counsel should alone argue the cause for all, and should, perhaps, be admonished to do so, if it appear to be reasonable and just. But when their separate rights exist, they cannot be compelled to waive, or to consolidate them. If two of the three should jointly employ two or more counsel, then the court might prevent any difficulty or confusion, by refusing (as it should do) to permit more than one of the joint counsel to speak. Nor would we admit, that if the court should clearly perceive that several counsel had been separately employed by several defendants in a joint action, merely for purposes of unjust advantage, when, in fact, the counsel of one is substantially the counsel of all, and when he argues for all, there would be no power to compel them to consolidate the arguments, and to select for themselves, and among themselves, some two counsel to argue the entire cause in the defense. The court should possess the right to prevent any abuse by litigants of their rights in court, or any perversion of them to vexatious or unjust ends.

But where it can be satisfactorily shown that one of several joint defendants is not identified in the defense with his co-defendants, and not only has disagreed with them in the employment of counsel, but has not been aided or represented by their associated efforts,

and in good faith desires to appear in his own defence by his counsel, or "*in propria persona*," the court has no rightful power to silence him. . . .

If the interests of the defendants seem to be in unison, if the argument for one includes or benefits the others, and if they all appear to act in concert, the court might refuse to permit more than two of the counsel to be heard, and leave it to the defendants to make the selection.

It is not shown that the circuit judge abused his discretion, or did injustice to Jacob Sodousky in this case. His guilt is so manifest, that if a jury had acquitted him, this court would be bound to grant a new trial. His counsel, in defending him alone, could not have ultimately benefitted him, because the jury must have found him guilty; and, therefore, he would have been contributory to the joint verdict. And as he was not the principal actor, no argument for him alone could, according to the facts exhibited in the record, have diminished the guilt of the principal or reduced the verdict. The guilt of the chief actor would have been the standard of the finding against all who were found guilty. Therefore, Jacob Sodousky was not concerned to persuade the jury that his guilt was slight in a comparative degree, but his only reasonable purpose was to convince them of his entire innocence. Wherefore, it does not appear that he was prejudiced by the decision of the court.

Besides, there is much reason for believing that the employment of several counsel was, in this case, a pretense designed merely for vexation and unjust advantage. This the circuit judge must have perceived, from all the circumstances characterizing the defense. Judging from the record, we are sure that he might have apprehended contrivance. Jacob Sodousky did not show, as he ought to have done, that he had a reasonable claim to be heard separately. Under all the circumstances, therefore, we are unable to ascertain that the circuit judge erred, or transcended the limits of a sound and enlightened discretion, or that Jacob Sodousky has any just cause for complaint. . . .

We have, therefore, come to the conclusion that there is no error in the judgment.

Wherefore, it must be affirmed.<sup>1</sup>

<sup>1</sup> As to the right to argue, see *Smith v. Marx*, 93 Ala. 311, 9 So. 194; *Douglass v. Hill*, 29 Kan. 527; *Houck v. Gue*, 30 Neb. 113, 46 N. W. 280. — ED.

THE COBB CHOCOLATE COMPANY *v.* KNUDSON.

SUPREME COURT OF ILLINOIS. 1904.

. [Reported 207 *Illinois*, 452.]

THIS is an action of trespass on the case by appellee, plaintiff below, against appellant, a corporation, defendant below, in the superior court of Cook county, to recover damages claimed by appellee for injuries sustained by him on September 15, 1899, while working for appellant in its chocolate factory in the city of Chicago. Appellee was injured by his fingers getting caught in the uncovered, revolving cog-wheels of a machine at and about which he was working. Trial was had before a jury, resulting in a verdict and judgment against appellant for \$2500, which judgment was affirmed by the Appellate Court. From the judgment of affirmance appellant prosecutes this appeal. . . .

RICKS, J.<sup>1</sup> . . . Counsel for the appellant further complain that the court abused its discretion in limiting the appellant to thirty minutes in which to argue the case before the jury. There were only six witnesses — three on each side. The testimony of none of these witnesses was very extended and that of some of them was very brief. We cannot say that the discretion of the trial judge, under such circumstances, was abused, nor perceive that the rights of appellant were unduly prejudiced by the rule. . . .

*Judgment affirmed.*<sup>2</sup>

THE NEW YORK AND LONG BRANCH RAILROAD  
COMPANY *v.* GARRITY.

SUPREME COURT OF NEW JERSEY. 1899.

[Reported 63 *New Jersey Law*, 50.]

GUMMERE, J. In disposing of this writ of error it will be necessary to consider but one of the exceptions taken at the trial, namely, whether the ruling of the court with relation to the opening and reply in the summing up to the jury was erroneous.

<sup>1</sup> A part of the statement of facts and a part of the opinion are omitted. — Ed.

<sup>2</sup> For cases in which limitations of time were upheld as a proper exercise of the trial court's discretion, see 1 Thompson, *Trials*, 2d ed., sec. 924; 2 *Encyc. of Pl. & Pr.* 702, 704.

For cases in which limitations of time were held an abuse of the trial court's discretion, see 1 Thompson, *Trials*, 2d ed., sec. 925; 2 *Encyc. of Pl. & Pr.* 703. — Ed.

The question arose, as appears by the bill of exceptions, in this way: After the testimony on both sides had been closed, the defendant's counsel requested an opening from the plaintiff, whereupon "plaintiff's counsel made a few remarks in opening the case." Defendant's counsel objected to the opening as being insufficient, and stated that, if that was all that plaintiff had to say, he had no reply to make. Plaintiff's counsel then proceeded "to sum up the case," to which defendant's counsel objected on the ground that, as he had not answered the opening argument there was nothing for plaintiff to reply to. The court, however, permitted plaintiff's counsel to proceed with his second argument notwithstanding the objection. At its close defendant's counsel asked to be permitted to reply to it. This request was refused by the court and to this ruling exception was taken and sealed.

We think that in this refusal there was error. Ordinarily a plaintiff who makes a mere nominal opening does so at his peril, and, if the defendant then submits his case without argument, the plaintiff will not be allowed to make a second argument. But, although this is the customary practice, it is always within the discretion of the court, when such a case arises, to permit the making of a second argument by the plaintiff, or rather, to state it more accurately, to make a fuller and more complete opening; and such permission will usually be granted when it appears that plaintiff has been led into making merely a formal opening, by the action of the defendant. When a second and more extended opening is permitted, however, the defendant is entitled to reply to it if he so desires, and if he does so, the plaintiff then has a right to make the closing argument.

The refusal of the court to permit the defendant's counsel to reply to the enlarged opening of the plaintiff deprived him of a substantial right, and the judgment below should therefore be reversed.<sup>1</sup>

<sup>1</sup> See *Hackney v. Del. & Atl. Tel. Co.*, 69 N. J. L. 335, 55 Atl. 252. But see *Barden v. Briscoe*, 36 Mich. 254. Compare *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582. — Ed.



MARRIAGE *v.* ELECTRIC COAL COMPANY.

APPELLATE COURT OF ILLINOIS, THIRD DISTRICT. 1912.

[Reported 176 *Illinois Appellate Court Reports*, 451.]

THOMPSON, P. J. This is a suit brought by Henry Marriage against the Electric Coal Company to recover damages for personal injuries alleged to have been sustained by him while he was in its employ as a coal miner. The declaration contains several counts, some alleging that the defendant wilfully failed to comply with section 21 of the Mines and Miners Act, and others that the defendant was guilty of common-law negligence. The plaintiff recovered a verdict and judgment for \$3,000. The defendant appeals.

The evidence shows that plaintiff was injured on February 4, 1911; that within two or three hours after he was injured, his family called a surgeon to examine and treat him; that all that surgeon discovered was that plaintiff was suffering pain from bruises about the hip, there was neither any swelling nor any indications of a fracture or dislocation; the next morning the surgeon went to further examine or treat him but was told the family did not want him, that they had got another physician. The evidence does not disclose that any other physician was ever called to treat plaintiff, although he now claims that his hip was fractured and dislocated. The evidence leaves the question of the extent of plaintiff's injury in great doubt. To justify the amount of the damages awarded, the injury must have been serious and permanent in character; if the injury was slight then the damages awarded are excessive.

In the final argument to the jury by plaintiff's counsel, the statement was made that "Hartshorn Brothers are not here today, they were not here yesterday"; objection was made to this statement of counsel, the plaintiff's counsel proceeded "they are not taking any interest in the case"; objection was again made and counsel was admonished by the court to confine himself to the evidence; counsel proceeded "I will say this about it; it is no more unreasonable in this case that we did not call Mr. Marriage's brother than that they did not call the Hartshorn Brothers to show they were complying with the law in this case"; objection was again made to the remarks and counsel continued "Why, no. He argued why we did n't call this man's brother. Why did n't they call the Hartshorn Brothers?"

At another time counsel read section 21 of the Mines and Miners Act. Objection was made, and then counsel continued, "Why doesn't he want me to read that law to-day? Because his company violated it;" objection was sustained to this remark and counsel continued, "Well, Mr. Troup is very technical here this morning about this argument. He seems to be afraid to let me argue this case."

The record shows that plaintiff made an offer to exhibit his leg to the jury and counsel for defendant objected to this demonstrative evidence. The court said it would be better to have the description of the injury in the record in words if it could be done. Counsel for plaintiff in final argument commented on the objection of defendant to this offer of evidence, and why the leg was not exhibited to the jury; objection was made and sustained to this line of argument; counsel then proceeded to argue, "why did n't they call the company doctor?" There is no evidence in the record tending to show that the company physician ever saw the plaintiff. Counsel again commented on the ruling regarding the exhibition of plaintiff's leg and got into another colloquy with the court.

Without reviewing the merits of the case for the reason that on another trial there may be additional evidence, it is sufficient to say the evidence is very conflicting, and of such a nature that improper conduct of counsel requires a reversal.

Hartshorn Brothers referred to by counsel for appellee may have had some interest in the mine as stockholders, but there is nothing in the case showing that they had any personal knowledge of how plaintiff was injured, but plaintiff's brother was with him in the mine at the time he was injured and knew about the circumstances under which he was injured. Comment on the absence of witnesses related to the parties to the suit, who are shown to have knowledge of the case, was proper but comment concerning the absence of parties not shown to know anything about the case was not permissible and was only made for the purpose of appealing to the prejudice of the jury.

The court had not permitted plaintiff to exhibit his leg to the jury. The conduct of counsel in arguing to the jury the propriety of this ruling and the effect of such evidence, which was not before the jury, was improper and unprofessional. *Chicago & M. Elec. R. Co. v. Judge*, 135 Ill. App. 377; *Parlin & Orendorff Co. v. Scott*, 137 Ill. App. 454; *Turner v. Lovington Coal Min. Co.*, 156 Ill. App. 60. Counsel not only argued to the jury the effect of evidence

not before it under the ruling of the court, but disregarded the ruling of the court on the propriety of his argument by in substance repeating what the court had held to be improper.

In civil cases the law is given to the jury by the court, and while counsel have the right to present their view of the law in argument, they have no right to read from law books to the jury. Counsel for appellee in this case not only read law to the jury, but after objection was made to such improper conduct, deliberately disregarded the ruling of the court by commenting on the motives of opposing counsel making the objection, who were strictly within their legal rights. The conduct of counsel was a violation of the rules of practice and a wilful defiance of the ruling of the court. *City of Chicago v. McGiven*, 78 Ill. 347.

The unwarranted argument of counsel for appellee undoubtedly greatly influenced the jury in plaintiff's favor and the judgment must be reversed because of such unprofessional conduct. The judgment is therefore reversed and the cause remanded.

*Reversed and remanded.*<sup>1</sup>

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## SECTION VIII.

### *Instructions to the Jury.*

#### SMITH *v.* CRICHTON.

COURT OF APPEALS OF MARYLAND. 1870.

[Reported 33 *Maryland*, 103.]

STEWART, J.<sup>2</sup> Exceptions have been taken by the appellant in this case to the ruling of the Court below, in the refusal to grant his three several prayers, and to the verbal instructions given, including the form, as well as the substance of them. . . .

The exception as to the form of the instruction, being verbal, when the defendant's prayers were in writing, cannot be supported.

<sup>1</sup> See *People v. McMahon*, 244 Ill. 45, 91 N. E. 104; *Bullard v. Boston & M. R. R.*, 64 N. H. 27, 5 Atl. 838, 10 Am. St. Rep. 367; *City of Shawnee v. Sparks*, 26 Okla. 665, 110 Pac. 881; *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582; 1 Thompson, *Trials*, 2d ed., secs. 955-1010.

As to the propriety of arguing questions of law to the jury in criminal cases see 1 Thompson, *Trials*, 2d ed., secs. 940-951. — Ep.

<sup>2</sup> The statement of facts is omitted together with a part of the opinion in which the refusal to give instructions requested by the defendant was held erroneous. — Ep.

Where the instruction is definite, and contains sound views of the law applicable to the case and intelligible to the jury, it can make no essential difference whether it is communicated to them in writing or orally.

It is true, that in the trial of causes, and the exposition of the law to the jury, the reduction of the instruction to writing is certainly more formal, less liable to hasty error, and may enable the Court the better to mature their views, and more distinctly and formally to express them to the jury as a general rule; but still the law may be sufficiently expounded to the jury through oral instructions. No doubt the Court would not hesitate, where it was requested, and deemed by the counsel to be material, to embody their views in writing, in advance of any oral communication to the jury. This matter, however, is left to the sound discretion of the court below, and is not the subject of review by this court.

When verbal instructions are given to the jury, it is certainly the right of the party who desires to except thereto, to have them reduced to writing, so that they may be reviewed on appeal, as was done in the present instance; and when that is the case it is no good cause of complaint, that the Court, in its discretion, chose in the first instance to instruct the jury orally.<sup>1</sup>

### GARDNER v. PICKET.

SUPREME COURT OF NEW YORK. 1838.

[Reported 19 *Wendell*, 186.]

MOTION for a new trial, on the grounds that the verdict rendered for the defendant was against evidence, and for errors in the charge of the judge to the jury. In the course of the charge, the judge remarked, as to a particular fact in the case, that in his opinion there was *not sufficient evidence* to establish the fact, but he submitted the question to the jury, and instructed them to consider the whole evidence in relation to it and to decide as they should find. This part of the charge of the judge was objected to.<sup>2</sup> . . .

<sup>1</sup> In some states statutes require the instructions to be in writing when this is requested by either party; in some states they must be in writing even in the absence of a request. See 1 *Blashfield*, Instructions to Juries, sec. 118. — Ed.

<sup>2</sup> The part of the opinion on this point only is given. — Ed.



*By the Court*, COWEN, J. The judge's charge that there was not sufficient proof to show an assignment of the judgment to Wood was a mere expression of opinion on the fact, which he still left to the jury. He had a right to give such an opinion, especially with such a qualification. *Solarte v. Melville*, 1 Mann. & Ryl. 198, is in point. 7 Barn. & Cres. 430, S. C. . . .

*New trial denied.*<sup>1</sup>

## SIMMONS v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1891.

[Reported 142 *United States*, 148.]

THIS was an indictment on section 5209 of the Revised Statutes for aiding and abetting one Claassen in embezzling and misapplying the funds of a certain national bank in the city of New York. The defendant pleaded not guilty. . . .

The case was then tried, and was submitted by the judge to the jury on March 10 under instructions beginning as follows: "I have the right, under the laws of the United States, to give you my opinion on questions of fact, but I refrain from doing so because I am well satisfied of your capacity to understand what has been testified to in all these days that we have been here engaged. I shall confine myself to stating to you the law by which you are bound, simply calling your attention to the questions of fact which are to be decided by you, for, as you know, juries decide questions of fact, and not the court."

On the next day the jury came into court and asked to be discharged from further consideration of the case. To this request the court, after ascertaining by inquiry that the jury required no further instructions in matter of law, replied as follows: "This case has occupied a long time. It is a case of importance, and the discharge of the jury at this time would involve another trial. It seems to me that that should not be had unless in a case of necessity. I see in this case no such necessity. I cannot understand the failure to agree arises from any difference of opinion based upon the insufficiency of the evidence in this case. Whenever in the opinion of the court the testimony is convincing, it is the duty of the court

<sup>1</sup> *Davidson v. Stanley*, 2 Man & Gr. 721, 3 Scott N. R. 49; *Smith v. Dart & Son*, 14 Q. B. D. 105; *Crotty v. Danbury*, 79 Conn. 379, 65 Atl. 147; *Foley v. Loughran*, 60 N. J. L. 464, 38 Atl. 960, *accord*. See 38 Cyc. 1040. — Ed.

to hold the jury together. Therefore I must decline your request to be discharged."

The defendant excepted to the judge's statement to the jury that he regarded the testimony as convincing, and, being found guilty and sentenced to imprisonment for six years in a penitentiary, tendered a bill of exceptions, which was allowed by the judge, and sued out this writ of error.

GRAY, J.<sup>1</sup> . . . The only other exception argued is to the statement made by the judge to the second jury, in denying their request to be discharged without having agreed upon a verdict, that he regarded the testimony as convincing. But at the outset of his charge he had told them, in so many words, that the facts were to be decided by the jury, and not by the court. And it is so well settled, by a long series of decisions of this court, that the judge presiding at a trial, civil or criminal, in any court of the United States, is authorized, whenever he thinks it will assist the jury in arriving at a just conclusion, to express to them his opinion upon the questions of fact which he submits to their determination, that it is only necessary to refer to two or three recent cases in which the judge's opinion on matters of fact was quite as plainly and strongly expressed to the jury as in the case at bar. *Vicksburg &c. Railroad v. Putnam*, 118 U. S. 545; *United States v. Philadelphia & Reading Railroad*, 123 U. S. 113; *Lovejoy v. United States*, 128 U. S. 171.

*Judgment affirmed.*<sup>2</sup>

ALLIS *v.* LEONARD *et al.*

COURT OF APPEALS OF NEW YORK. 1874.

[Reported 58 *New York*, 288.]

APPEAL by defendants Stevens and Hathaway from judgment of the General Term of the Supreme Court in the third judicial department, affirming, as to them, a judgment in favor of plaintiff entered upon a verdict, and affirming an order denying a motion for a new trial.

This was an action upon a promissory note. The defence was

<sup>1</sup> A part of the statement of facts and a part of the opinion are omitted. — Ed.

<sup>2</sup> The federal courts are not bound to follow the state practice as to instructions. *Nudd v. Burrows*, 91 U. S. 426, 23 L. ed. 286. — Ed.

payment. Plaintiff was called as a witness and gave testimony in his own behalf.

Defendants called two witnesses who testified, in substance, that they knew plaintiff's reputation and that it was bad.

The court charged the jury, among other things, as follows:

"You have the plaintiff's evidence, to which you are to give such credit as you think it entitled; and allow me to say, before the consideration of the evidence, that the impeachment or attempted impeachment of the plaintiff has entirely failed. It has not affected his credit, but yet the credit of the witness is always in the hands of jurors, and they are to give such credit to each one as they are entitled to. You are to look at the witness on the stand and observe the evidence he gives, and the probability of the story he relates, and the consistency of the statement he makes, and his apparent candor and frankness and his interest in the case. All these things you will take into consideration in determining his credit. You will take into consideration such evidence as tends to impeach — for instance, if his statements out of court are inconsistent with his evidence in court, it is proper for your consideration in determining the credit due him as a witness; and it is proper for you to consider the credit to be given to the plaintiff and all the different witnesses called upon the stand. You are to determine who has told the truth and what the truth of this transaction is."

The defendant excepted to so much of the charge as is in the words following:

"That the impeachment or attempted impeachment of the plaintiff has entirely failed; it has not affected his credit."

CHURCH, Ch. J. Two witnesses gave evidence tending to show that the plaintiff's general character was bad. This evidence though not very strong, was legitimate upon that question. The judge charged the jury, "that the impeachment, or attempted impeachment of the plaintiff, has entirely failed; it has not affected his credit," etc., which was specifically excepted to. I can see no sufficient answer to the point that this was error. The evidence was competent, and whether strong or weak, should have been submitted to the jury for their consideration, upon the credibility of the witness. Three answers have been suggested: First, that other portions of the charge neutralized the effect of this clause. It is true that the learned judge told the jury that the credibility of the witness was a question for them, but we think the fair construction of all he said about it was to instruct them that, in passing upon the credibility of the witness they must exclude from con-

sideration the element of general bad character, sought to be proved by the two witnesses called, and the jury must have so understood it. Second, it is said that, at most, it was but an expression of opinion or commentary upon the facts which is not the subject of a legal exception. This is not tenable. It was more than an opinion or commentary; it was a decision or instruction that the evidence adduced was not sufficient to be considered by them, that it was a failure, and did not affect the credit of the witness. This was an instruction in the form and substance of law. There are cases holding that a mere opinion or commentary upon the facts is not the subject of an exception, but in such cases it is held that the judge must accompany such commentary with explicit instructions that it is the duty of the jury, notwithstanding, to consider the evidence and decide as they think the truth requires. (19 Wend. 186; 42 Barb. 326.) To be free from legal objection it must be advisory merely, and must not be put in the form of a direction as matter of law. (21 Wend. 509-525.) The jury is the constitutional tribunal for the determination of questions of fact; and I am persuaded that justice is better administered when courts refrain altogether from any interference with its rightful province. Jurors cannot distinguish between a direction in a matter of law or fact. They are bound to take the law from the court; and a positive direction from the bench, as to a question of fact, is as potent as if it pertained to a question of law; and even an expression of opinion calculated to influence the decision of the jury in a matter clearly within their cognizance, should be critically scrutinized. In this case the direction was unqualified, as we construe the charge. Third, it is claimed that the exception is not available, because no request was made to submit the question to the jury. The rule invoked does not apply. There was no necessity for a request; the court had made a distinct ruling that the attempted impeachment was a failure, which as we have seen was error, and the defendant excepted. This was all that was necessary to protect the defendant's rights. We cannot of course speculate as to whether this error had any effect upon the result or not. We are not permitted to consider that question. The error is one which cannot be overlooked without establishing a dangerous precedent.

The judgment must be reversed, and a new trial ordered, costs to abide the event.

All concur.

*Judgment reversed.*



COMMONWEALTH *v.* BARRY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1864.

[Reported 9 *Allen*, 276.]

INDICTMENT for keeping and maintaining a tenement in School Street in Boston, used for the illegal sale and illegal keeping for sale of intoxicating liquors.

At the trial in the superior court, before Vose, J., all the witnesses were policemen, two of them being officers whose daily beat included School Street. The defendant's counsel, in his argument to the jury, commented with some severity upon their testimony, as the testimony of policemen. The judge in his charge told the jury that the same rules were applicable to policemen as to all other witnesses, in determining the credit to be given to their testimony; that in very many of the cases which had been tried at the present term of the court policemen had been the principal witnesses, and he thought the jury would agree with him in the opinion that in all these cases they had manifested great intelligence, and testified with apparent candor and impartiality.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

BIGELOW, C. J. Upon mature consideration we have come to the conclusion that we cannot give our sanction to the instructions under which this case was submitted to the jury. Viewed in either of the two aspects of which they are susceptible, it appears to us that they cannot be supported, consistently with the rules of law.

If they are to be regarded only as an expression of opinion by the court concerning the credibility of certain witnesses who had testified in other cases than the one on trial, they were clearly of a nature to mislead the jury. The implication from the language of the court is direct and positive, that the jury might properly infer that the witnesses in support of this prosecution were entitled to credit for the reason that other persons engaged in the same occupation had testified with candor and impartiality in the trial of other cases. The objection to this instruction is twofold. In the first place, it authorized the jury to draw an inference which was not a legitimate deduction from the premises. It by no means follows naturally or logically that witnesses employed in the same or similar occupations will testify on all occasions with equal fairness

and impartiality. In the next place, the instructions gave the jury to understand that they might travel beyond the case as proved before them, to seek for corroboration and support of the testimony adduced in behalf of the prosecution in facts which not only were not proved but which could not have been properly offered in evidence by the government. Nor is this the whole extent of the objection. The facts thus introduced into the case were submitted to the jury with a distinct expression of opinion by the court as to the effect to be given to them, at a stage of the trial when the defendant could not controvert them, and without any opportunity being given to his counsel to address the jury on the weight which was due to them. Such a course of proceeding is certainly unusual, and, as we think, does not accord with the due and orderly conduct of a criminal trial.

But in another aspect it seems to us that the instructions were objectionable. The credibility of the witnesses who had testified in support of the charge in the indictment was a fact which it was the exclusive province of the jury to determine. As essentially affecting their bias, and the credit to be given to their testimony, their occupation and connection with the origin of the prosecution against the defendant might be important elements, and, within proper limits, proper subjects of comment by counsel, and of consideration by the jury. If the instructions are to be construed, as we think they fairly may be, as the expression of the opinion of the court on the degree of credit to which these witnesses were entitled, the court exceeded its authority in stating such opinion to the jury. By Gen. Sts. *c.* 172, § 15, the duty of charging the jury in criminal cases is specially enjoined upon the court. By Gen. Sts. *c.* 115, § 5,<sup>1</sup> which is applicable alike to civil and criminal trials, the rule is prescribed by which courts are to be guided in the performance of this duty. It must be admitted that this provision of the statute is not expressed in terms which are free from ambiguity. But although there is a seeming repugnancy in the two branches of the section, we think that they are susceptible of a reasonable interpretation, which will give full force and effect to both of them, and at the same time carry out what seems to have been the manifest purpose of the legislature. It is clear beyond controversy, that the first clause contains a distinct and absolute prohibition, that the "courts shall not charge juries with respect to matters of fact."

<sup>1</sup> This statute is as follows: "The courts shall not charge juries with respect to matters of fact, but may state the testimony and the law."

To reconcile this with the clause that follows, which provides that the courts "may state the testimony and the law," the prohibition must be regarded as a restraint only on the expression of an opinion by the court on the question whether a particular fact or series of facts involved in the issue of a case is or is not established by the evidence. In other words, it is to be construed so as to prevent courts from interfering with the province of juries by any statement of their own judgment or conclusion upon matters of fact. This construction effectually accomplishes the great object of guarding against any bias or undue influence which might be created in the minds of jurors, if the weight of the opinion of the court should be permitted to be thrown into the scale in deciding upon issues of fact. But further than this the legislature did not intend to go. The statute was not designed to deprive the court of all power to deal with the facts proved. On the contrary, the last clause of the section very clearly contemplates that the duty of the court may not be fully discharged by a mere statement of the law. By providing that the court may also state the testimony, the manifest purpose of the legislature was to recognize and affirm the power and authority of the court, to be exercised according to its discretion, to sum up the evidence, to state its legal effect and bearing on the issues, and to indicate its proper application under the rules of law.

In the case at bar, the court exceeded the limit prescribed by the statute. If the language used by the court was intended to be applicable to the witnesses who had testified in behalf of the prosecution, it was an expression of opinion as to their credibility. As this was a matter of fact, within the exclusive province of the jury to determine, such expression of opinion went beyond a "statement of the testimony," and trenched on prohibited ground, being a charge to the jury "with respect to matters of fact."

We have already said that the occupation of a witness, in connection with other facts, may have a material bearing on the credibility of his testimony in a particular case. But we feel bound to add that we do not intend to express an opinion on the question whether in the case at bar there was any valid ground for calling in question the veracity or candor of the witnesses whom the defendant's counsel sought to impeach. No such point seems to have been raised at the trial, nor are the facts bearing upon it stated in the exceptions. The inference from the course of the trial, especially from the line of argument which the counsel for the defendant was permitted to take, and from the instructions to

the jury, is, that the ground on which the impeachment of the witnesses was placed was deemed to have been proper matter for the consideration of the jury. *Exceptions sustained.*<sup>1</sup>

## CHAPMAN v. MCCORMICK.

COURT OF APPEALS OF NEW YORK. 1881.

[Reported 86 *New York*, 479.]

DANFORTH, J. I cannot concur in the conclusion that the learned trial court did not err in refusing to permit counsel to ask for further instructions to the jury. It may well be that circumstances other than those noted in the appeal book had occurred during the trial, and which, if written out, would justify this refusal; but I take the case as I find it. At the close of the testimony there was summing up by counsel, a charge to the jury, and, as the record shows, they "having risen from their seats and about to retire in charge of an officer to deliberate on their verdict," the defendant's counsel said: "Wait one moment, please." The court, "No; I will not add to my charge at all;" and addressing the jury said, "Go on, gentlemen." Defendant's counsel: "I want to ask the court to make some charge to the jury." The court: "No; I have said all I ought to say. You take an exception?" Defendant's counsel: "Yes; but I want to ask the court to charge the jury in certain respects. I claim that to be my right, your honor." The court: "I refuse, and you take an exception." The respondent states, upon his printed points, "an opportunity to make requests had been offered and had not been availed of." But this is accompanied by no reference to the case, and a careful examination fails to disclose the occurrence. The effect of such a fact, had it existed, need not be considered. Nor was the refusal of the court put upon that ground. The request of the counsel was obviously addressed to the court, and not, as the plaintiff urges, to the jury, for the reply to the counsel was: "I will not add to my charge at all;" and to the jury the court said: "Go on." All this time the jury were in their box, having merely risen from their seats, and the court assumed a knowledge of the reason

<sup>1</sup> For a list of the states in which the court is forbidden to charge the jury with respect to matters of fact, see 1 *Blashfield*, Instructions to Juries, sec. 46.

In some states the judge is forbidden even to sum up the evidence. See 1 *Blashfield*, Instructions to Juries, sec. 54. — Ed.



for the request of counsel. An explicit statement of it followed. It should, I think, have been listened to. It is the duty of counsel so to conduct his client's cause that the jury may have the facts before them, under such instructions as to the law as are material to the case; and as under our system of judicature those instructions can be given only by the court, it would seem to be the client's absolute right to have his counsel heard concerning them. In no other way can the suitor have the benefit of the machinery of the courts; of the law as claimed by him if the response is favorable, of an exception for review if it is refused. The right may be forfeited by the omission of counsel to speak in time, for the client is bound by his conduct, and as to that the court has a large discretion. Here it was not exercised. The jury were before the court, in their proper places. Its ear was withheld from the counsel, not because he did not speak in season, but because, anticipating the object of counsel, the court decided to deny him. It may be that no suggestion would have changed that mind; but had it been heard, the defendant would have had either the benefit of an exception to that decision, or a ruling of the court in accordance with his views. To one or the other he was entitled; and it was beyond the power of the court to deprive him of it. As a trial judge is bound to instruct the jury on each proposition of law submitted to him by counsel bearing upon the evidence (*Zabriskie v. Smith*, 13 N. Y. 322; *Foster v. People*, 50 id. 601), so it must be a legal right of counsel to submit such propositions (*Pennock v. Dialogue*, 2 Peters, 15), and its denial by the court a subject of exception and review upon appeal. The judge, therefore, erred in refusing the request of counsel, and the error is fatal to the judgment, unless it appears that there was no question in the case to be submitted to the jury (*People v. Gray*, 5 Wend. 289); or that the request came too late. Neither fact exists. The case was submitted to the jury as one for their determination, and the request was made before they left their seats, and before, so far as the record shows, any other step had been taken. That one was to be taken, *i. e.*, that the jury were about to retire, is not sufficient. There is nothing to show that counsel did not seek the attention of the court as soon as possible after the close of the charge, and it appears affirmatively that he did so before they retired. This was sufficient. *State v. Catlin*, 3 Vt. 530, 534.

I have reached this conclusion with reluctance, and with no disposition to interfere with the exercise of the large and necessary discretion intrusted to a trial judge. But a right valuable to

litigants seems to have been denied; and for this reason there should, I think, be a new trial.

MILLER, J. (dissenting). . . . An exception is also taken to the decision of the judge upon the trial in regard to the requests to charge made by the counsel for the defendant. At the time when the requests were presented, the jury had been charged, risen from their seats, and were about to retire in charge of an officer to deliberate upon the verdict, and the judge declined to make any further charge, and directed the jury to retire.

The orderly proceedings of a court upon a trial rest very much in the discretion of the presiding judge, and unless it appears that such discretion has been abused, it is not within the province of an appellate tribunal to interfere with its exercise. The usual course upon a trial is to hand up the requests to the judge before the charge is made, and at most, prior to the time when the jury are ready to retire in charge of an officer. A proper degree of vigilance would certainly require that the right to present requests should be exercised before the latter contingency, and a delay beyond this ordinarily would leave it for the judge to say whether he would keep or call the jury back and pass upon the requests. It should not be overlooked, that it does not appear that any portion of the charge as made was excepted to, nor what additional charge was desired, or that it would affect the disposition of the case in any manner. The counsel stated that he desired the judge to make "some charge to the jury," and to charge in some respects without advising what he desired, or showing that it was material. Nor did he state what he did desire in this respect, as he should have done under the circumstances presented. We are not prepared to say that any injustice has been done, or that there was any such abuse of discretion as would authorize an interference with the decision of the judge by a reversal of the judgment.

RAPALLO, ANDREWS, EARL and FINCH, JJ., concur with DANKFORTH, J. FOLGER, Ch. J., concurs with MILLER, J., dissenting.

*Judgment reversed.*

STUCKEY *v.* FRITSCHÉ.

SUPREME COURT OF WISCONSIN. 1890.

[Reported 77 *Wisconsin*, 329.]

TAYLOR, J.<sup>1</sup> . . . After the counsel had argued the case to the jury, the learned circuit judge gave no charge or instructions to the jury, but made the following remark: "I have no charge to give you, gentlemen. Conduct the jury to their room." No exception was taken at the time by the learned counsel for the defendant to the declination of the learned judge to instruct the jury; neither did he request the judge to instruct them generally, nor request that any specific instruction should be given to them. On making a motion for a new trial, the learned counsel for the defendant assigns this as a reason for granting the same, in the following language, as his ninth reason: "The court erred in not instructing the jury in the law applicable to the case." The learned counsel for the appellant claims that it is the duty of the trial judge to instruct the jury in every case upon the law of the case, whether requested to do so or not; and he cites sec. 2853, S. & B. Ann. Stats.,<sup>2</sup> as imposing such duty upon the trial judge. We are clearly of the opinion that this section was enacted for the purpose of requiring the instructions, when given, to be given in *writing*, unless the giving of them in writing was waived by the parties, and was not enacted for the purpose of making it the duty of the trial judge to instruct the jury in any and every case. This was so held by this court in *Hepler v. State*, 58 Wis. 46, 49. The same rule is adopted in New York. *Haupt v. Pohlmann*, 1 Rob. (N. Y.), 121; *Graser v. Stellwagen*, 25 N. Y. 315. It was also held that an exception for a refusal to instruct the jury as requested by the counsel must be taken on the trial in order to be available to the party complaining of such refusal. *Murphy v. Martin*, 58 Wis. 276; *Collins v. Shannon*, 67 Wis. 441; *Firmeis v. State*, 61 Wis. 140; *Adams v. McKay*, 63 Wis. 404, 408; *Gardner v. Gooch*, 48 Me.

<sup>1</sup> A part of the opinion is omitted. — Ed.

<sup>2</sup> Sec. 2853, S. & B. Ann. Stats., provides: "Upon the trial of every action, the judge presiding shall, before giving the same to the jury, reduce to writing and give as written his charge and instructions to the jury, and all further and particular instructions given them when they shall return after having once retired to deliberate, unless a written charge be waived by counsel at the commencement of the trial; and except that the charge or instructions may be delivered orally when taken down by the official phonographic reporter of the court. . . ." — REP.

487. We think it very clear that the defendant waived any right to insist upon the trial judge instructing the jury, by not taking exception to his declining to give instructions. Had he desired the judge to instruct the jury, he should have either made a general request that the judge instruct the jury upon the law of the case, or have offered specific instructions and requested the judge to give the same to the jury. Having done neither in this case, he must be deemed to have assented to submitting the case to the jury without instructions.

*By the Court.* — The judgment of the circuit court is affirmed.<sup>1</sup>

THE CHICAGO CITY RAILWAY COMPANY v.  
MAGER.

SUPREME COURT OF ILLINOIS. 1900.

[Reported 185 *Illinois*, 336.]

Boggs, J.<sup>2</sup> The only alleged errors here urged are, that on the hearing of this cause, which was an action on the case by appellee to recover damages for personal injuries alleged to have been inflicted through actionable negligence on the part of the appellant company, the trial judge erroneously refused to give to the jury instruction No. 23 asked by appellant, and so erroneously framed an instruction given by the court on its own motion as to authorize the rendition of a verdict against the appellant company on a ground of negligence not advanced by the declaration. Instruction No. 23 was as follows:

“The jury are instructed that in considering the evidence of the witnesses in this case and determining what weight shall be attached to the same, they have the right to take into consideration whatever interest, if any appears from the evidence, such witness or witnesses may have in the result of the suit.”

<sup>1</sup> In *Neville v. Fine Art & Gen. Ins. Co.*, [1897] A. C. 68, p. 76, Halsbury, L. C., said: “Where you are complaining of non-direction of the judge, or that he did not leave a question to the jury, if you had an opportunity of asking him to do it and you abstained from asking for it, no Court would ever have granted you a new trial; for the obvious reason that if you thought you had got enough you were not allowed to stand aside and let all the expense be incurred and a new trial ordered simply because of your own neglect.” See also *Express Company v. Kountze Brothers*, 8 Wall. (U. S.), 342, 19 L. ed. 45. — Ed.

<sup>2</sup> A part of the opinion is omitted. — Ed.



Instruction No. 16 given at the request of the appellant company was as follows:

"The jury are instructed that while the law permits a plaintiff in a case to testify in his own behalf, nevertheless the jury have a right, in weighing his evidence and determining how much credence is to be given to it, to take into consideration that he is the plaintiff and his interest in the result of the suit."

Each of these instructions asked the court to direct the attention of the jury to the same class of witnesses, namely, those having an interest in the result of the suit. Mr. Greenleaf, in his work on Evidence, (vol. 1, sec. 386,) defines an interest in the result of a suit to be "some legal, certain and immediate interest, however minute, either in the event of the cause itself, or in the record, as an instrument of evidence, in support of his own claims, in a subsequent action. It must be a legal interest, as distinguished from the prejudice or bias resulting from friendship or hatred, or from consanguinity, or any other domestic or social or any official relation, or any other motives by which men are generally influenced, for these go only to the credibility." It is not claimed any one who gave testimony, other than the appellee, had any such an interest in the result of the suit. The court was therefore justified in refusing instruction No. 23 as being but a repetition of instruction No. 16. Counsel for the appellant company asked twenty-six instructions, twenty-one of which were granted. It was the province and duty of the court to decline to give a second instruction on the same point. If counsel for appellant desired the jury should be advised it was competent for them, in determining as to the weight and value proper to be given to the testimony of witnesses, to consider any bias or prejudice existing in the mind of the witness, arising from sentiments of friendship or hatred, if any such bias or hatred appeared, an instruction should have been so framed for that purpose. . . .

*Judgment affirmed.*<sup>1</sup>

<sup>1</sup> In a few states requested instructions must be given or refused in the exact language of the request. See *East Tenn., Va. & Ga. R. R. Co. v. Bayliss*, 77 Ala. 429. — Ed.

THE COBB CHOCOLATE COMPANY v.  
KNUDSON.

SUPREME COURT OF ILLINOIS. 1904.

[Reported 207 *Illinois*, 452.]

RICKS, J.<sup>1</sup> . . . After the jury were empaneled, and before the first witness was sworn, the court entered an order limiting the number of instructions to be given to thirty, — fifteen for plaintiff and fifteen for defendant, — and that no instructions in excess of that number would be examined or received by the court. Appellant insists that such order was reversible error. In the case of *Chicago City Railway Co. v. Sandusky*, 198 Ill. 400, an order substantially the same was entered, and while the court there deprecated the giving of a useless number of instructions, as is so often done, yet it was declared that it was not proper to lay down a hard and fast rule stating the number of instructions that should be given in a case, it being stated that many times a larger number of short, concise instructions were preferable to a limited number of long, diffuse and complicated instructions. In that case the number of instructions was limited to twelve on a side and the appellant had introduced twenty in excess of that number, but in its argument only dwelt upon the injury alleged to have been sustained by the refusal of one of the twenty instructions not received, and the court being of the opinion that the substance of that instruction was contained in an instruction that was given for the appellee, refused to reverse the case. So in the case at bar, upon an examination of the instructions not received, three in number, we find that the substance of each of them was contained in instructions given. The witnesses in this case were few in number and the issues simple, so appellant was not unduly hampered by being allowed but fifteen instructions. Nor do counsel for appellant, in their contention, point out wherein they were unable, in such number of instructions, to cover the points involved, nor have they shown wherein their cause was prejudiced by such restriction, and we do not see how it could have been, and regarded the contention as not well taken. . . .

*Judgment affirmed.*

<sup>1</sup> A part of the opinion only is given. — Ed.

STRUEBING *v.* STEVENSON.

SUPREME COURT OF IOWA. 1905.

[Reported 129 *Iowa*, 25.]

WEAVER, J.<sup>1</sup> On March 26, 1902, the defendant sold to the plaintiff a herd of thirty-two Shorthorn cows and heifers. In this action plaintiff charges that the cows were expressly warranted to be all right, suitable for breeding purposes, regular breeders, and that twenty-two head of them were with calf by a certain thoroughbred bull known as "Red Goldfinder." In a second count of his petition he charges that defendant falsely represented the cows to be as above stated, and that in violation of said warranty, and contrary to said representations, the cows, or many of them, were and had been sick of an obscure disease known as "contagious abortion," were not suitable for use for breeding purposes, and were not with calf by Red Goldfinder, to the great loss and damage of the plaintiff. The defendant took issue upon the allegations of warranty and false representations, and the verdict was in his favor. Counsel for appellant do not contend that the verdict is without support in the testimony, but argue that the trial court erred in its instructions to the jury and in refusing other instructions asked. Only two propositions are relied upon for a reversal.

I. It is said that the court, in the second paragraph of its instructions, erroneously told the jury in substance that, if plaintiff had failed to prove the alleged diseased condition of the cows at the time of their purchase, he could recover nothing from the defendant. This it is said unduly narrowed the issues, because the alleged warranty went beyond the matter of disease and assured the plaintiff that the cows were suitable for breeding purposes and were with calf by Red Goldfinder. If we were to pass upon this paragraph alone as applied to issues joined in the pleadings, there would be an appearance of merit in the objection here made. But the appropriateness of instructions cannot be determined by the pleadings alone, for reference must be had also to the testimony introduced and to the issues actually contested upon the trial.

Counsel have not seen fit to abstract all the evidence, but, taking it as given and referring to the transcript which has been certified to this court, it quite clearly appears that the alleged diseased condition of the cows was the one central fact upon which plaintiff relied as a breach of the alleged warranty, and that the unsuitable-

<sup>1</sup> A part of the opinion is omitted. — Ed.

ness or unfitness of the cows or some of them for breeding purposes was put forward not as an additional ground of recovery, but as showing the deleterious and damaging effects of the disease above referred to. This feature of the trial is further emphasized by the fact that in all of the several instructions asked by the plaintiff his right to recover was based, first, upon the warranty or representations, and, second, upon the diseased or unsound condition of the cows. Moreover, it should be said that in another part of the charge the court correctly stated what facts were essential to constitute a warranty, and the jury by a special verdict found that no warranty had been established. Of the alleged warranty that the cows were with calf by Red Goldfinder, we think the abstracts disclose no testimony which would have justified a verdict in the plaintiff's favor. We find, therefore, no prejudicial error in the above-mentioned paragraph of the court's instructions to the jury. . . .

For the reasons stated, the judgment of the district court is *affirmed*.

## HARRINGTON v. THE EUREKA HILL MINING CO.

SUPREME COURT OF UTAH. 1898.

[Reported 17 *Utah*, 300.]

ZANE, C. J.<sup>1</sup> This action was brought to recover damages to plaintiff in consequence of personal injuries, caused, as alleged, by the negligence of the defendant, in putting plaintiff to work, in a drift of its mine that reasonable prudence and care required to be first timbered, without warning him of danger. This is an appeal by the defendant from a judgment of the district court upon the verdict of the jury awarding the plaintiff \$10,000 damages. In deciding this appeal, we are not at liberty to consider the evidence further than it may be necessary in deciding upon the correctness of the rulings of the court assigned as error, in applying to the evidence principles of law, and so far as necessary to determine whether any essential fact is entirely unsupported by the evidence.

The defendant assigned as error the following statement in the charge of the court: "The burden is upon the defendant to establish contributory negligence on the part of the plaintiff in this case." The rule of evidence undoubtedly is that the burden of proof lies on the party who substantially asserts the affirmative

<sup>1</sup> A part of the opinion is omitted. — ED.



of the issue, and the rule, as applied to proof of contributory negligence in this state, is that the defendant is required to allege contributory negligence on the part of the plaintiff, and to prove it by a preponderance of the evidence, and the burden was not upon the plaintiff to disprove it. That is undoubtedly the rule in this state, and the court did not err in so charging. The statement complained of, standing alone, might have misled the jury; but, when considered with other parts of the charge, it is not probable they were. If the evidence introduced by the plaintiff furnished sufficient proof of contributory negligence on his part, of course, it was not necessary for the defendant to prove it also. In determining the question of contributory negligence on the part of the plaintiff, it was the duty of the jurors to consider the whole evidence bearing on the issue. If the plaintiff offered any evidence tending to prove or disprove negligence on his part, the jurors should have considered that, with the evidence offered by the defendant, if any, tending to prove or disprove it, and it was the duty of the court to so inform the jury. In deciding the issue as to the negligence of the defendant, and the issue as to the contributory negligence of the plaintiff, it was the duty of the jurors to consider all the evidence before them bearing upon either. Taking the portion of the charge above quoted in connection with the other parts of it, the jurors must have understood they should consider all the evidence before them in deciding the issue as to contributory negligence. They were told it was for the plaintiff to prove his case by a preponderance of the evidence, and that, if the evidence bearing upon his case was evenly balanced, or it preponderated in favor of the defendant, the plaintiff could not recover; that, if the danger to which the plaintiff was exposed was equally visible to plaintiff and defendant, and the plaintiff had equal or superior opportunity to that of the defendant to ascertain the danger, the defendant was not liable. While the court informed the jury that the burden was upon the plaintiff of proving negligence on the part of the defendant, and the burden was upon the defendant of proving contributory negligence on the part of the plaintiff, as reasonable men they must have understood, from the entire charge, that they were to decide those issues from all the evidence bearing upon them, and that, in so doing, they were not limited to the consideration of the evidence offered by either side. . . .

*The judgment is affirmed.*<sup>1</sup>

BARTCH and MINER, JJ., *concur*.

<sup>1</sup> *City of Beatrice v. Forbes*, 74 Neb. 125, 103 N. W. 1069, *accord*. — ED.

## COMMONWEALTH v. TUEY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1851.

[Reported 8 *Cushing*, 1.]

ON the trial in the court of common pleas, before Hoar, J., of an indictment against the defendant, the jury, having received instructions from the judge, to which no exception was taken, retired to consider of their verdict, and after an absence of several hours, were sent for by the judge, and reported that they had been unable to agree. The judge thereupon said to them, in substance, as follows:—

“The only mode, provided by our constitution and laws for deciding questions of fact in criminal cases, is by the verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking, in all cases, absolute certainty cannot be attained or expected. Although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor, and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided; that you are selected in the same manner, and from the same source, from which any future jury must be; and there is no reason to suppose that the case will ever be submitted to twelve men more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on the one side or the other. And with this view, it is your duty to decide the case, if you can conscientiously do so. In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases. In the present case, the burden of proof is upon the commonwealth to establish every part of it, beyond a reasonable doubt; and if, in any part of it, you are left in doubt, the defendant is entitled to the benefit of the doubt, and must be acquitted. But, in conferring together, you ought to pay proper respect to each other's opinions, and listen, with a disposition to be convinced, to each other's arguments. And, on the one hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one, which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, and who have heard the same

evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves, whether they may not reasonably, and ought not to doubt the correctness of a judgment, which is not concurred in by most of those with whom they are associated; and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows."

The jury were then directed to retire, and deliberate further upon the case; and having done so, found the defendant guilty, who thereupon alleged exceptions to the foregoing instructions.

BIGELOW, J. The defendant objects to the instructions given to the jury in this case, on the ground, that they were equivalent to a direction, on the part of the court, to a minority of the jury to yield their own opinions and judgment to the views of the majority, and render a verdict in conformity therewith; or, in other words, that a dissenting juror was bound to take into consideration the opinions of his fellows, as an element by which his own convictions were to be controlled. But we do not so understand the purport and effect of the language used by the judge who tried the cause. The instructions went no further, than to say, that if any of the jury differed, in their views of the evidence, from a large number of their fellows, such difference of opinion should induce the minority to doubt the correctness of their own judgments, and lead them to a reëxamination and closer scrutiny of the facts in the case, for the purpose of revising and reconsidering their preconceived opinions. In this view, the court did nothing more than to present to the minds of the dissenting jurors a strong motive to unanimity.

Upon a careful consideration of these instructions, we are clearly of opinion, that so far from being improper, or of a nature to mislead, they were entirely sound, and well adapted to bring to the attention of the jury one of the means by which they might be safely guided in the performance of their duty. A proper regard for the judgment of other men will often greatly aid us in forming our own. In many of the relations of life, it becomes a duty to yield and conform to the opinions of others, when it can be done without a sacrifice of conscientious convictions; more especially is this a duty, when we are called on to act with others, and when dissent on our part may defeat all action, and materially affect the rights and interests of third parties. Such is the rule of duty constantly recognized and acted on by courts of justice. They not

only form their opinions, but reconsider, revise, and modify their own declared judgments, by the aid and in the light of the decisions of other tribunals. But this could not be done, if it were not permitted to them to doubt and correct their opinions, when they were found to differ from those of other men, who have had equal opportunities of arriving at sound conclusions with themselves.

The jury room is, surely, no place for pride of opinion, or for espousing and maintaining, in the spirit of controversy, either side of a cause. The single object to be there effected is to arrive at a true verdict: and this can only be done by deliberation, mutual concession, and a due deference to the opinions of each other. By such means and such only, in a body where unanimity is required, can safe and just results be attained; and without them, the trial by jury, instead of being an essential aid in the administration of justice, would become a most effectual obstacle to it.

*Exceptions overruled.*<sup>1</sup>

CRANSTON, as Administratrix, etc., v. THE NEW YORK  
CENTRAL AND HUDSON RIVER RAILROAD COM-  
PANY.

COURT OF APPEALS OF NEW YORK. 1886.

[Reported 103 *New York*, 614.]

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made February 11, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 39 Hun, 308.)

This action was brought to recover damages for alleged negligence causing the death of David Cranston, plaintiff's intestate, who was killed while crossing defendant's road, the wagon in which he was riding having been struck by an engine attached to a train passing on said road.

The facts, so far as material to the question discussed, are stated in the opinion.

<sup>1</sup> In *Highland Foundry Co. v. N. Y., N. H., & H. R. R.*, 199 Mass. 403, 85 N. E. 437 the court said: "There is perhaps no case in our reports more familiar to those, whether on the bench or at the bar, who are engaged in the trial of jury cases, than *Commonwealth v. Tukey*. It is often quoted or read to juries slow in coming to a verdict, and many times with salutary effect. But it generally has been regarded by the profession as going nearly if not quite to the extreme limit." — Ed.



RAPALLO, J. It is a serious question whether the uncontroverted evidence did not disclose a want of the care and caution which the law required of the plaintiff's intestate in approaching so dangerous a crossing as that at which he lost his life, and whether a nonsuit should not, therefore, have been ordered; but we need not discuss that question, as the case contains an exception which we are all agreed is well taken, and requires a reversal of the judgment and a new trial. After the jury had retired to consider their verdict, they came into court, and one of them stated that there was no probability of their agreeing. To this the court replied as follows: "I can't take any such statement as that, gentlemen; you must get together upon a matter of this kind." He then added, "no juror ought to remain entirely firm in his own conviction one way or another, until he has made up his mind, beyond all question, that he is necessarily right and the others are necessarily wrong." To this statement the defendant's counsel excepted. The jury thereupon brought in a verdict for the plaintiff.

We are of opinion that the instruction excepted to was not a correct statement of the law. It was incumbent upon the party holding the affirmative of the issue, who in this case was the plaintiff, to satisfy the jury, by a preponderance of evidence, of the facts upon which her right to recover depended. If she failed to do so the defendant was entitled to a verdict. The jurors who were not satisfied by the evidence, of the truth of the plaintiff's allegations, were justified in refusing, for that reason, to find a verdict in her favor, although they might not have made up their minds beyond all question that they were necessarily right, and that those who were in favor of finding a verdict for the plaintiff were necessarily wrong. To sustain this instruction would be to cast upon the defendant, in a civil action, a burden quite as heavy as that which rests upon the prosecution in a criminal case, and perhaps still more onerous. If the evidence was so clear as to lead to a conclusion with the degree of certainty required by the charge, there was nothing to submit to the jury, and it was the duty of the court either to direct a verdict or to nonsuit the plaintiff.

The judgment should be reversed and a new trial ordered, costs to abide the event.

All concur.

*Judgment reversed.*<sup>1</sup>

<sup>1</sup> See *Richardson v. Coleman*, 131 Ind. 210, 29 N. E. 909; *Armstrong v. James & Co.*, 155 Ia. 562, 136 N. W. 686; *Covey v. Rogers*, 85 Vt. 308, 81 Atl. 1130; *Barlow v. Foster*, 149 Wis. 613, 136 N. W. 822. — Ed.

## SECTION IX.

*Conduct and Deliberations of the Jury.*[Blackstone, *Commentaries*, Book III, \*375-\*376.]

THE jury, after the proofs are summed up, unless the case be very clear, withdraw from the bar to consider of their verdict: and in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed, a method of accelerating unanimity not wholly unknown in other constitutions of Europe, and in matters of greater concern. For, by the golden bull of the empire, if, after the congress is opened, the electors delay the election of a king of the Romans for thirty days, they shall be fed only with bread and water till the same is accomplished. But if our juries eat or drink at all, or have any eatables about them, without consent of the court, and before verdict, it is finable; and if they do so at his charge for whom they afterwards find, it will set aside the verdict. Also, if they speak with either of the parties or their agents, after they are gone from the bar; or if they receive any fresh evidence in private; or if to prevent disputes they cast lots for whom they shall find; any of these circumstances will entirely vitiate the verdict. And it has been held, that if the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or imprisoned, the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart. This necessity of a total unanimity seems to be peculiar to our own constitution; or, at least in the *nembda* or jury of the ancient Goths, there was required (even in criminal cases) only the consent of the major part; and in case of an equality, the defendant was held to be acquitted.

## LESTER v. STANLEY.

CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT  
OF CONNECTICUT. 1808.

[Reported 3 *Day*, 287.]

AFTER this case had been committed to the jury, and they were about to retire, LIVINGSTON, J. remarked, that he understood it had sometimes been the practice with juries in this state to separate while they had a case under consideration. The rule of the common law requires them to be kept together until they have

agreed on a verdict; and on looking at the statute, we do not perceive that that varies it. The statute, indeed, appears to have been made in affirmance of the common law. The words are explicit: "And when the court have committed any case to the consideration of the jury, the jury shall be confined, under the custody of an officer appointed by the court, until they are agreed on a verdict." If they separate before, and afterwards return a verdict, it will be set aside.

NEWELL *v.* AYER *et al.*

SUPREME JUDICIAL COURT OF MAINE. 1850.

[Reported 32 *Maine*, 334.]

A MESSAGE was sent by the jury to the Judge, that they were not likely to agree upon a verdict; and the officer, under direction of the Judge, opened the door and apprised the jury that they were called into court. It was then said by one of the jury that they could probably agree, and the Judge, on being notified of it, recalled the order. While the door was thus opened, two of the jurors left the room for a minute or two, and then returned, after which a verdict was agreed upon.

For this cause, a motion was made for a new trial.

The two jurors testified that, their absence was upon a needful occasion, and that, while absent, they had no conversation with any person.

WELLS, J., orally. Where misconduct on the part of jurors has been of injury to a party, it is the duty of the court to set aside their verdict. It was misconduct in the two jurors to leave their room without permission of the court. But they held no conversation with any one, and it does not appear that any injury could have resulted from their act. *The motion is overruled.*

THE CITY OF NEW ALBANY *v.* McCULLOCH.

SUPREME COURT OF INDIANA. 1891.

[Reported 127 *Indiana*, 500.]

COFFEY, J.<sup>1</sup> This was an action by the appellee against the appellant, instituted in the Floyd Circuit Court, to recover damages on account of personal injuries sustained by the appellee by reason of a defective sidewalk. . . .

<sup>1</sup> A part of the opinion is omitted. — Ed.

A trial of the cause by jury resulted in a verdict for the appellee, upon which the court, over a motion for a new trial, rendered judgment. . . .

It is contended by the appellant that one of the jurors who tried the cause was guilty of such misconduct as entitles it to a new trial.

It appears, by affidavits on file, that one of the jurors separated from the remaining eleven, after they had retired to deliberate of their verdict, without the permission of the court, and remained out of sight of the bailiff and the other jurors for one half hour.

In support of the verdict the appellee filed the affidavit of the juror who absented himself to the effect that during his absence from the other jurors he did not communicate with any one in relation to the case, or upon any subject connected therewith.

Misconduct of a juror, in order to be sufficient to authorize the granting of a new trial, must be gross, and must have resulted in probable injury to the complaining party. *Harrison v. Price*, 22 Ind. 165; *Whelchell v. State*, 23 Ind. 89; *Medler v. State, ex rel.*, 26 Ind. 171; *Carter v. Ford Plate Glass Co.*, 85 Ind. 180.

However reprehensible the conduct of the juror who absented himself from the others may have been, under the showing that he had no communication with any person upon the subject of the case which he was sworn to try, we think it cannot be inferred that his absence probably injured the appellant. In the absence of such a showing, we have seen that his misconduct was not sufficient to authorize a new trial.

We are of the opinion that there is no available error in the record.

*Judgment affirmed.*<sup>1</sup>

<sup>1</sup> See *Obear v. Gray*, 68 Ga. 182; *Boggs v. Chicago, etc., R. R. Co.*, 29 Ia. 577; *Pracht v. Whittridge*, 44 Kan. 710, 25 Pac. 192; *Ehrhard v. McKee*, 44 Kan. 715, 25 Pac. 193; *Commonwealth v. Edgerton*, 200 Mass. 318, 86 N. E. 768; *Compton v. Arnold*, 54 Mo. 149; *Oram v. Bishop*, 7 Halst. (N. J.), 153; *Armleder v. Lieberman*, 33 Oh. St. 77; *Edward Thompson Co. v. Gunderson*, 10 S. D. 42, 71 N. W. 764; *Downer v. Baxter*, 30 Vt. 467.—ED.



NICHOLS *v.* NICHOLS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1884.

[Reported 136 *Massachusetts*, 256.]

CONTRACT upon a promissory note for \$3000. Trial in this court, before Colburn, J. The jury returned a verdict for the plaintiff.

The defendant subsequently moved to have the verdict set aside on account of the acts of the officer having the jury in charge. Colburn, J., overruled the motion, and reported the case for the consideration of the full court, in substance as follows:

The court was adjourned on Friday afternoon until Monday morning, the jury being left in charge of an officer, with instructions to discharge them if they did not agree by ten o'clock that evening, and, if they agreed, to have them seal their verdict and return it on Monday morning. The judge left town immediately after the adjournment of court. After the judge had left, the foreman of the jury told the officer that a juror was sick, had a chill, and required some brandy. The officer saw the juror, and thought him sick. He sent to a druggist and got a two-ounce vial of brandy and passed it to the foreman. Afterwards, another juror fell upon the floor in a fit, and the officer sent for a physician, and allowed him to administer to such juror, who recovered. Subsequently, the jury agreed upon a verdict for the plaintiff, sealed it up, and were discharged, and returned the verdict to court on Monday morning.

The judge was satisfied that the officer acted in entire good faith, and that the defendant was in no way prejudiced by his acts.

If the ruling was right, the verdict was to stand; otherwise, the verdict to be set aside.<sup>1</sup>

C. ALLEN, J. . . . On the motion for a new trial, the presiding judge found as a fact, that the officer acted in entire good faith, and that the defendant was in no way prejudiced by his acts. Motions for a new trial are addressed to the discretion of the presiding judge. *Boston v. Robbins*, 116 Mass. 313. *Woodward v. Leavitt*, 107 Mass. 453, 460. His determination upon the matters of fact is not open to revision by us, nor is his decision overruling the motion, unless, as matter of law, he was required, upon the facts found, to

<sup>1</sup> The statement of facts is abridged and a part of the opinion is omitted. — Ed.

set aside the verdict. *Brady v. American Print Works*, 119 Mass. 98, and cases cited. No other question is presented to us by the report in this case. In *Commonwealth v. Roby*, 12 Pick. 496, which was an indictment for murder, the decision related only to cider, the use of which by the jury was held not to be a cause for granting a new trial; and it was stated, as the result of the authorities then brought to the attention of the court, that, where ardent spirits have been used by the jury, it is proper to set aside the verdict. Since that decision, the question has often arisen in other jurisdictions, and the preponderance of modern judicial opinion seems to be that taking spirits in moderate quantities as a beverage is not necessarily regarded as a legal cause for a new trial, unless it is shown that it operated injuriously. Many cases upon this subject are referred to by counsel, and others are collected in *Whart. Crim. Pl. & Pr.* §§ 731, 841. However this may be, we do not think the rules of law imperatively require us to hold that it is a legal cause for setting aside the verdict, where a juror, who is seized with a sudden temporary indisposition, without the intervention or knowledge of either party to the suit, obtains and uses, merely for the relief of his disease or pain, a small quantity of spirits, and where it appears that he is not thereby disqualified for the due performance of his duty as a juror.

The question of the effect of the introduction of the physician into the jury-room, for the purpose of giving medical aid and relief to the juror, who appears to have stood in pressing need thereof, is not free from difficulty. It is, however, obvious that a merely temporary attack of sickness, though it may for the time being incapacitate the juror, is not a necessary ground for the discharge of the jury. It is proper, when the circumstances will admit, to await the result, and see if within a reasonable time he so far recovers as to enable the trial to proceed, or a verdict to be returned. If such sickness is brought to the attention of the court while the jury are deliberating on their verdict, and medical attendance appears to be necessary, the better way ordinarily would seem to be for the court to select a suitable physician, and to caution him in advance not to enter into any conversation with any of the jury upon the case, or upon any matter except such as may be directly connected with the needed relief for the disorder. The court must have the power, in its discretion, to allow suitable and necessary medicines and medical attendance to be furnished to the jury, and, indeed, it is its plain duty to see to it that such are furnished in case of urgent need. In the present case, the judge

was not accessible at the time, but nothing appears to have been done differently from what might well have been ordered by him. The officer and the physician were both competent as witnesses to testify to the extent of their communications with the jury. There is no reason to suppose that either of them said anything to any juror which in any way bore upon the case under consideration; or that the course of substantial justice was to any extent perverted or disturbed by what occurred. This was a matter which it was especially for the presiding justice to investigate. We cannot say, as matter of law, that a new trial must necessarily be granted. It is not as if there had been a voluntary and gratuitous intrusion upon the deliberations of the jury, for the purpose of taking part therein or of listening thereto, with a submission on the part of the jury to such intrusion, so that their deliberations were voluntarily conducted by them in the presence of an unauthorized person, as was the case in *People v. Knapp*, 42 Mich. 267, 269. In the various emergencies which are liable to occur in the course of a protracted trial, irregularities must occur sometimes. While the court will always seek to guard against them, and especially to keep the jury as far as possible from all influences which can cast a suspicion upon the integrity of their verdict, it nevertheless ought not to be swift to grant a new trial on account of irregularities not attended with any intentional wrong, and where it is made satisfactorily to appear that the party complaining has not and could not have sustained any injury from them. *People v. Ransom*, 7 Wend. 417, 424. 1 Bish. Crim. Proc. § 1277, and cases there cited.

*Judgment on the verdict.*<sup>1</sup>

See *Wesley v. Chicago, etc., Ry. Co.*, 84 Ia. 441, 51 N. W. 163.

As to the effect of the drinking of intoxicating liquors by jurors, see *Sanitary District of Chicago v. Cullerton*, 147 Ill. 385, 35 N. E. 723; *Patrick v. Victor Knitting Mills Co.*, 37 N. Y. App. Div. 7, 55 N. Y. Supp. 340.

As to the effect of eating or drinking without the permission of the court, see *Commonwealth v. Roby*, 12 Pick. (Mass.), 496, 516; 2 Thompson, Trials, 2d ed., secs. 2562, 2563.

As to the effect of the presence of a stranger in the jury room, see *Starling v. Thorne*, 87 Ga. 513, 13 S. E. 552; *Barbour's Adm'r v. Archer*, 3 Bibb (Ky.), S. See also *Sanitary District of Chicago v. Cullerton*, 147 Ill. 385, 35 N. E. 723; *Baizley v. Welsh*, 71 N. J. L. 471, 60 Atl. 59; 2 Thompson, Trials, 2d ed., sec. 2553. — Ed.

## STATE v. MURPHY.

SUPREME COURT OF NORTH DAKOTA. 1908.

[Reported 17 *North Dakota*, 48.]

MORGAN, C. J.<sup>1</sup> The defendant was convicted of the crime of forgery in the third degree, and sentenced to imprisonment in the penitentiary for the period of one year and six months. . . .

After the jury had been deliberating on their verdict for about forty-eight hours, the trial judge was sent for by the jury, and he appeared pursuant to such request, and the following proceedings were had as stated by the trial judge in the settled statement of the case: "At some time between the hours of 8.30 and 9 o'clock on December 3, 1906, the said Honorable Chas. A. Pollock, on coming to the courtroom and his chambers and being informed that the jury or some of the jurors desired to communicate with him, went to the room where said jury were deliberating and were confined, rapped on the floor, and, the door being immediately opened by some one from the inside and being opened from right to left, stepped inside of the door, leaving the jury room door ajar, and while standing in the open space addressed the jury as follows: 'Good evening, gentlemen. I understand you want to see me. Have you agreed?' To which the foreman of the jury answered: 'No; I think we cannot agree.' Whereupon the Honorable Charles A. Pollock, after pausing for a second, replied: 'I will ask you to consider the matter further. Good night.' Whereupon the said Honorable Chas. A. Pollock closed the door to the said jury room and returned to his chambers. Thereafter, in a short time, the bailiff reported to the said Honorable Chas. A. Pollock that the jury had agreed. That the visit of the said Honorable Chas. A. Pollock to the said jury room and the conversation there had between himself and the juror, as aforesaid, was had in the absence of the defendant and his counsel, and was without the knowledge or consent of the defendant or his counsel, and that no person or persons were present at said conversation, except the Honorable Chas. A. Pollock and the members of the jury. And that no record was made at the time of what was said and done on the occasion of the said visit of the said judge to the said jury room. I will further state that my addressing the jury as 'Good evening,' or 'Good night,' was nothing more than a saluta-

<sup>1</sup> A part of the opinion of the Chief Justice, together with the concurring opinion of Spalding, J., is omitted. — Ed.



tion, and anything I said to them was not stated in a dictatorial manner, or intended or calculated as a threat. I will add, further, that in doing what I did I simply followed the practice which has obtained in this district so long as I have known anything of the practice, covering a period of 26 years. . . . And in going to the jury room upon the occasion in question the only object the court had was to ascertain whether any one was sick and unable to further deliberate, and also to find out whether they had agreed, and in no manner by word, act or deed attempted to influence their deliberations."

As to the purity of the intentions of the judge in going into the jury room in this case, and there having the brief communication with the jury, no certificate or proof is necessary so far as this court is concerned, as it well knows that his uprightness and sincere desire to be absolutely just and fair in all cases are beyond question. That admitted fact, however, does not meet the question before us, which is: Did he do that which was beyond his judicial functions in respect to the case? We are forced to the conclusion that he did. His presence in the jury room for any kind of communication with the jury is not contemplated by any provision of the statute. The opposite is the plain inference from the statute. All communication to the jury in open court is subject to exception by the parties, if deemed improper. If any communication is made to them in the jury room in the absence of the parties, no opportunity is afforded for objections and exceptions at the time. The open court is the place for communications to the jury in the presence of, or on notice to the attorneys. The jury room is for the jury alone, and no communications are allowed with them in the room except upon orders from the court through the officer in charge of them, who is permitted to ask them whether they have agreed upon a verdict. All communications to the jury in reference to the case should be made in open court, and all communications to them in the jury room avoided. In this way all distrust and fear that something improper is said or done will be without foundation, and every act be subject to exception and review. Any communication by word or writing not in open court affects the efficiency of jury trials as a means of accomplishing justice after giving all parties full opportunity of being heard at all stages of the trial. A strict compliance with this practice of having all proceedings in court in the presence of counsel, or on notice to them, unless waived, is better than to countenance violations thereof unless prejudice is shown. The state urgently insists that no prej-

udice could have resulted from what was done or said in this case, but we shall not consider that question. However, the fact that the foreman said that he thought they could not agree when the judge first spoke to them, and that they did agree in five or ten minutes thereafter, would be a stubborn fact for consideration if we entered upon an inquiry as to the effect upon the jury of the words spoken to them and the visit to the room. We think that any communication in this way as to the case should be prohibited and held prejudicial. It is against the policy of the law to indulge in secret communications or conferences with the jury or with jurors in reference to the merits or law of the case. To determine in each case whether prejudice resulted would be difficult, if not impossible, and justice will be better subserved by avoiding such communications entirely. The authorities are practically unanimous in condemning such communications, and in holding them prejudicial as a matter of law.

In *State v. Wroth*, 15 Wash. 621, 47 Pac. 106, the court said: "In the discharge of his official duties, the place for the judge is on the bench. As to him the law has closed the portals of the jury room, and he may not enter. The appellant was not obliged to follow the judge to the jury room in order to protect his legal rights, or to see that the jury was not influenced by the presence of the judge; and the state cannot be permitted to show what occurred between the judge and the jury at a place where the judge had no right to be, and in regard to which no official record could be made." In *Hanover v. State*, 125 Wis. 444, 104 N. W. 116, the court said: "These rights are clearly of an important nature, and affect the substance of a jury trial and the right of a party to be heard or to bring in review every transaction of the court's proceedings. For the attainment of the best administration of justice, the law requiring that all proceedings of courts be open and public, and in the presence of the parties or their representatives, must be strictly enforced; and, in case of any infringement of this policy, parties are not to be put to the burden of showing that it in fact injured them, even though it be manifest that no improper motives prompted the acts complained of." In *Sargent v. Roberts*, 1 Pick. (Mass.) 337, 11 Am. Dec. 185, the court said, speaking through Mr. Chief Justice Parker: "As it is impossible, we think, to complain of the substance of the communication, the only question is whether any communication at all is proper; and, if it was not, the party against whom the verdict was is entitled to a new trial. . . . No communication whatever ought to take place

between the judge and the jury, after the cause has been submitted to them by the charge of the judge unless in open court. . . . The only sure way to prevent all jealousy and suspicion is to consider the judge as having no control whatever over the case except in open court in the presence of the parties and their counsel. The public interest requires that litigating parties should have nothing to complain of or suspect in the administration of justice, and the inconvenience of the jurors is of small consideration compared to this great object. . . . It is better that everybody should suffer inconvenience than that a practice should be continued which is capable of abuse, or at least of being the ground of uneasiness and jealousy." See, also, *Danes v. Pearson*, 6 Ind. App. 465, 33 N. E. 976; *Du Cate v. Town of Brighton*, (Wis.) 114 N. W. 103.

The other questions argued in the brief will not probably arise on another trial. Hence consideration of them is not material.

The judgment is reversed, a new trial granted, and the cause is remanded for further proceedings.<sup>1</sup>

## KNIGHT *v.* THE INHABITANTS OF FREEPORT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1816.

[Reported 13 *Massachusetts*, 218.]

AFTER a verdict at the last October term for the plaintiff in review, and before judgment, the counsel for the defendants in review moved the court for a new trial; on the ground that one Abel A. Briggs, who was a witness for Knight on the trial of the cause, after the empanneling of the jury and before the trial, applied to Justin Kent, one of the jurors, and stated to him that this cause was of great consequence to him, Briggs; and if it went against Knight, he, Briggs, should have to pay the costs; and that the defending the action was a spiteful thing on the part of the said inhabitants of Freeport: the said counsel declaring that they had no knowledge of the said facts, until after the jury had returned their said verdict. — The juror testified to the truth of the foregoing statement: and added that Knight was not present at

<sup>1</sup> See *Sargent v. Roberts*, 1 Pick. (Mass.), 337, 11 Am. Dec. 185; *Moseley v. Washburn*, 165 Mass. 417, 43 N. E. 182; *Berst v. Moxom*, 163 Mo. App. 123, 145 S. W. 857; *Wintertown Bank & Loan Co. v. Mix*, 51 N. Y. 558; *Hurst v. Webster Mfg. Co.*, 128 Wis. 342, 107 N. W. 666; and a collection of cases in a note to the principal case in 17 L. R. A. (S. S.), 609. — Ed.

the time, nor did the juror know that he, Knight, had any knowledge thereof. — And it was admitted that the said Briggs was Knight's son-in-law, and did assist him in supporting his cause.

*By the court.* Too much care and precaution cannot be used to preserve the purity of jury trials. The attempt to influence the juror in this case was grossly improper, and ought to be discountenanced. It is not necessary to shew that the mind of the juror, thus tampered with, was influenced by this attempt. Perhaps it is not in his power to say whether he was influenced or not. If he was, there is sufficient cause to set aside the verdict; and if he was not, and the party who has gained the verdict has a good cause, he will still be entitled to a verdict upon another trial. We cannot be too strict in guarding trials by jury from improper influence. This strictness is necessary to give due confidence to parties in the results of their causes: and every one ought to know that for any, even the least, intermeddling with jurors, a verdict will always be set aside. *New trial ordered.*<sup>1</sup>

### SCOTT v. TUBBS.

SUPREME COURT OF COLORADO. 1908.

[Reported 43 *Colorado*, 221.]

STEEL, C. J. The action was brought under the statute entitled "Eminent Domain," and had for its purpose the condemnation of the plaintiff in error's land to the use of the defendant in error for an irrigating canal. A jury assessed the plaintiff's damages at forty dollars. Judgment was entered upon the verdict. The costs, amounting to \$303.50, were taxed against the plaintiff in error.

Several assignments of error are discussed in the brief, but we shall ignore all but one, that relating to the improper conduct of the jury. Before proceeding to a consideration of the assignment of error mentioned, we direct attention to the opinion of this court in the case *Colorado Fuel & Iron Co. v. Four Mile Railway Co.*, 29 Colo. 90, wherein the statutes providing for the summoning of a jury in proceedings under the "Eminent Domain" act are construed.

Upon the day set for the hearing, at the request of petitioner it was ordered that the jury inspect the premises sought to be con-

<sup>1</sup> See also *Bowler v. Washington*, 62 Me. 302. — Ed.



demned. After the examination of the premises and before returning to the court-room, four of the jurors, apart from the officer in charge of the jury, went to a saloon in company of the petitioner, defendant in error here, and at his invitation drank with him at the bar of the saloon. This was conclusively shown by the affidavits filed in support of the motion for a new trial. Two of the jurors state in their affidavits that the petitioner took them to a saloon and treated them, but that their verdict was not influenced thereby, and that they did not know they had been doing wrong. The court offered to set aside the verdict and to grant a new trial upon the payment of the costs by the respondent, but the respondent refused to take a new trial upon the terms proposed. Judgment was then entered, and the respondent appealed.

A new trial should have been granted, and the petitioner should have been required to pay the costs. Such action on the part of the petitioner and the jurors cannot be tolerated, and to excuse such conduct would be to render a trial in a court of justice a farce. It may be that the petitioner and jurors were entirely innocent of any wrong intent, and that no wrong or injustice was in fact done, but the opportunity for wrong-doing under the conditions shown in the affidavit is so great that we must, in order to maintain the integrity of judicial procedure, reverse the case. Jurors who separate from the other jurors and the officer in whose charge they are and accept entertainment from one of the parties while they are considering the case are guilty of such misconduct that a verdict rendered by them has not the appearance even of being fair and impartial. And a party who so far forgets his position as a litigant as to furnish entertainment for jurors who are to pass upon the merits of the controversy in which he is engaged should not complain if a verdict in his favor by jurors with whom he has been in such close communication, and to whom he has furnished drink, is set aside on motion of his adversary. Nor should the court consider whether the verdict was or was not influenced by the petitioner. The conduct complained of is so manifestly improper that there is but one course open. Nor shall we consider what other courts have done under similar circumstances. Questions like these cannot be determined by the weight of authority, unless there be a doubt in our minds as to the course for us to pursue; and as no doubt exists, we shall reverse the judgment. *Reversed.*<sup>1</sup>

MR. JUSTICE GODDARD and MR. JUSTICE BAILEY concur.

<sup>1</sup> See *Burke v. McDonald*, 3 Ida. 296; *Vane v. Evanston*, 150 Ill. 616, 37 N. E. 901; *Drainage Commissioners v. Knox*, 237 Ill. 148, 86 N. E. 636; *Tripp*

## THOMAS v. CHAPMAN and Another.

SUPREME COURT OF NEW YORK. 1865.

[Reported 45 *Barbour*, 98.]

MOTION to set aside a verdict on account of the misconduct of the officer having charge of the jury.

SUTHERLAND, J. With some hesitation I have come to the conclusion that the verdict in this case must be set aside for misconduct of the officer having the jury in charge. Bird, one of the jurors, in his affidavit, states expressly, that the officer "stated to them (the jury), that the court had adjourned and left orders for him (said officer), to lock up the jury and keep them all night, unless they agreed upon a verdict; *that the case was clear for the plaintiff, and that the jury had better agree and go home; that if they did not, soon, he should lock the jury up for the night.*" That on several occasions in the course of the afternoon, the officer made "the announcements, threats or intimations in about the words above stated." It is also stated in the affidavit of Bird, that he was quite unwell at the time, and but for the prospect or fear of being locked up for the night, he never would have agreed to the verdict, which was rendered for the plaintiff for \$2348.07. Thomas, another of the jurors, states in his affidavit that the statement in Bird's affidavit as regards the words used by the officer, is true, and that he "would never have agreed to the verdict, had it not been for the prospect of being kept up all night," &c.

The affidavit of the officer having charge of the jury is not entirely satisfactory. He states that the jury retired after the charge of the court, at about half past twelve o'clock; that the court adjourned about three o'clock; that he "did not have any communication with the jurors, or any of them, except to ask them if they had agreed upon their verdict, or to listen to remarks or inquiries which they made to him; that he did not say anything to them, *in reference to the merits of the case or their deliberations as jurymen.*" He states, that upon informing the jury that the Judge

*v. County Comr's*, 2 Allen (Mass.), 556; *Kellogg v. Wilder*, 15 Johns. (N. Y.), 455 (*semble*, though both parties treated and with court's consent); *McGill Bros. v. Seaboard Air Line Ry.*, 75 S. C. 177, 55 S. E. 216. And see a note to the principal case in 19 L. R. A. (N. s.), 733.

When the value of cigars was in issue, the treating of the jury to cigars by a party is clearly ground for new trial. See *Platt v. Threadgill*, 80 Fed. 192. — ED.

had directed him to allow them to go out for refreshments at five o'clock "one of the jurors asked deponent what he would do with them after that; whether he would lock them up all night; that deponent would not tell them what his instructions were on that point, and passed it off by saying, *I suppose so,*" &c.

It is true, the officer denies, in his affidavit, that he said to the jury what Bird and Thomas, the two jurymen, say he said; or that he used words of like tenor and effect; but I think his affidavit contains a confession that he did say what he ought not to have said.

The affidavit of the other ten jurors is a mere general affidavit, that the statements in the officer's affidavit as to the conduct of the officer, and his communications with the jury, are true. Conceding this affidavit to have been made in the most perfect good faith, it probably only amounts to this, viz.: that the ten jurors did not hear or may not have heard, the statements of the officer mentioned in the affidavits of the other two jurymen.

Affidavits of jurors will not be received to show their own misconduct, or the misconduct of their fellows (*Clum v. Smith*, 5 Hill, 560); but I think there is no doubt that they are admissible to show the misconduct of a party, or of the officer having charge of them. See *Reynolds v. Champlain Trans. Co.*, 9 How. Pr. R. 7.

That portion of the affidavits of the two jurors which goes to show that they agreed to the verdict only in consequence of the statements of the officer, is not probably admissible for *that purpose*; (*Taylor v. Everett*, 2 How. Pr. R. 23), but it is not necessary for the defendant, Chapman, to show that the verdict was in fact influenced by the statements of the officer. It is sufficient, I think, for him to show that there is reason to suspect that the statements were made, and if made, that they were likely or calculated to influence the verdict. *Wilson v. Abrahams*, 1 Hill, 211. *Knight v. Inhabitants of Freeport*, 17 Mass. R. 218. *Coster v. Merest*, 3 Brod. & Bing, 257. 7 C. L. Rep. 433.

The motion to [set] aside the verdict for misconduct of the officer must be granted, with \$10 costs, to abide the event of the action. Of course it will be necessary to decide the motion for a new trial on the case made.<sup>1</sup>

<sup>1</sup> Compare *People v. Sheldon*, 156 N. Y. 268, 50 N. E. 840. — Ed.

DARLING, Administrator, *v.* THE NEW YORK, PROVIDENCE & BOSTON RAILROAD COMPANY.

SUPREME COURT OF RHODE ISLAND. 1892.

[Reported 17 *Rhode Island*, 708.]

MATTESON, C. J. The defendant petitions for a new trial on several grounds, of which three only were urged at the hearing, viz.: *first*, that the verdict was against the evidence; *second*, that the court erred in its instructions to the jury; *third*, that the jury were influenced in their decision by a communication to them by the officer in charge of them.<sup>1</sup> . . .

After the case had gone to the jury, and they had been in their room about an hour deliberating upon their verdict, the judge directed the officer in charge of them to inquire of the foreman if there was a prospect of an early agreement, as he wished to go out to dinner at a quarter of six. The officer conveyed the message to the foreman, who answered that he would knock by quarter of six and let the court know whether the jury had agreed. Thereupon the officer said to the foreman, "If you do not, you can take your own time," and jokingly added, "all night, if necessary." The defendant contends that this remark of the officer operated as a threat to the jury that, unless they agreed before a quarter of six, they would be kept out all night, or at least until they should agree within that time, and was therefore such a constraint put upon them as to render their verdict void; and it further contends that it is not required to show affirmatively that such communication tended to its injury, but that such communication was so dangerous and impolitic that it should be presumed conclusively that harm was done. There are cases which support this claim. *Cole v. Swan*, 4 Greene, Iowa, 32; *Obear, Executor, v. Gray*, 68 Ga. 182. But the weight of authority, and the better opinion as it seems to us, is to the effect that, unless the communication from the officer to the jury had a manifest tendency to influence the jury improperly against the unsuccessful party, or was such that prejudice has resulted to such party, it furnishes no ground for a new trial. Thus, in *Wiggin v. Downer*, 67 How. Pr. 65, it was held that the expression to the jury by the officer in charge of them of an opinion that unless they agreed they would be detained until the next day at noon, though improper, was not such an irregularity as should avoid the verdict, and did not amount to an illegal constraint.

<sup>1</sup> Only the opinion of the court on the third ground is given. — ED.



And, again, in *Leach v. Wilbur*, 9 Allen, 212, it appeared that between four and five o'clock in the morning, the jury having retired to their room about five o'clock of the preceding day, Thursday, one of the jurors asked the officer having them in charge how long the court would keep them together, and he replied that he did not know, but they would have to stay until Saturday, and that a little after five o'clock the jury agreed. It was held that a new trial would not be granted. And see *Reins v. The People*, 30 Ill. 256; *Price v. Lambert*, 3 N. J. Law, 122; *Pope & Jacobs v. The State*, 36 Mass. 121; *McGuire v. State*, 10 Tex. App. 125. The officious intermeddling of the officer was highly reprehensible, and might have subjected him to punishment; it was a violation of his duty and of his oath; but it appears to have been thoughtless, without any design to favor either party, and it had no manifest tendency to prejudice the defendant; nor does it appear that prejudice has resulted from it to the defendant. The defendant, it is true, has produced the affidavit of a juror to his belief that the message of the court and the remark of the officer influenced the jury in giving a verdict for the plaintiff, as, immediately after, certain of the jury who had been for the defendant changed and agreed to a verdict for the plaintiff. But, apart from the consideration that the affidavit of a juror is not competent evidence to prove what takes place in the jury room for the purpose of impeaching the verdict, the affidavit is only to the belief of the juror based upon a fact by no means conclusive.

Defendant's petition for a new trial denied and dismissed.

PAGE *v.* WHEELER *et al.*

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE.  
1829.

[Reported 5 *New Hampshire*, 91.]

ASSUMPSIT for goods sold and delivered, between the 24th December, 1826, and the 13th June, 1827.

The cause was tried here upon the general issue, at October term, 1828.

It was admitted that the goods mentioned in the declaration were sold to Jonathan Wheeler, one of the defendants by the plaintiff, and that they were delivered upon the credit of the said Jonathan. But there was evidence tending to prove, that Jonathan

Wheeler was indebted to Stephen Wheeler, the other defendant, — that Stephen knew that Jonathan must shortly fail — that Stephen advised Jonathan to go to Boston, where he had credit, and buy goods, and let him have them to pay what was due to him from Jonathan — that they went to Boston together, and Stephen there held out that Jonathan was in good credit — that Jonathan bought goods of the plaintiff — that large quantities of goods were transferred from Jonathan to Stephen, and that Jonathan failed and run away wholly insolvent.

Upon this evidence, it was left to the jury to say whether Stephen, for the purpose of securing his own debt, combined with Jonathan to procure these goods on Jonathan's credit, and for that purpose held out that Jonathan was a man in good credit, when he knew the fact to be otherwise, and the jury were instructed that if the goods were thus obtained, the defendants might be considered as partners in the purchase, and that both were liable.

The jury having returned a verdict in favor of the defendants, L. Chamberlain, for the plaintiff, moved for a new trial on the ground, that a large number of papers purporting to be bills of goods purchased by Jonathan Wheeler, of divers persons in the years 1826 and 1827, and also sundry papers purporting to be bills of goods purchased by Jonathan and J. F. Wheeler, in the years 1825 and 1826, were delivered to the jury, when they retired to consider of their verdict, the same papers never having been read during the trial nor seen by the plaintiff's counsel.

The fact that such papers went thus to the jury was not disputed.

RICHARDSON, C. J. delivered the opinion of the court.

If it appeared in this case, that the papers, which were delivered to the jury without being read upon the trial, were designedly so delivered by the party, who obtained the verdict, we should not stop to enquire, whether the papers were material or not, but should at once set aside the verdict as a proper punishment for the misconduct of the party. 5 Pick. 296, *Hix v. Drury*; 3 B. & B. 272, *Coster v. Merest*.

But we see nothing, that affords any reasonable ground to suspect, that the papers were handed to the jury with any improper views. It is highly probable, that they went to the jury inadvertently and by mistake among other papers.

If a paper goes by mistake to the jury, but they never examine it, the verdict is not to be set aside on that account. 3 Johns. Rep. 252, *Hackley v. Hastie*.

In this case, as there is no evidence to the contrary, we must presume that the jury examined all the papers which were delivered to them.

The rule seems to be, that, if material papers not read in evidence are handed to the jury by mistake, this is a sufficient cause for granting a new trial. And it is not competent to the party who has obtained the verdict, to prove by the jurors that they were not influenced by the papers in finding their verdict; but the court must be governed by the tendency of the papers apparent from the face of them. 5 Mass. Rep. 405, *Whitney v. Whitman*.

The question then is, were the papers which went to the jury by mistake in this cause so wholly immaterial, that they cannot be presumed to have had any influence upon the verdict?

We are of opinion, that those papers were wholly immaterial. It was not pretended on the part of the plaintiff that there was any partnership between Jonathan and Stephen Wheeler, or that they were in any way connected in business except in relation to the goods purchased just before Jonathan absconded. The bills of parcels then could have no tendency to shew anything but what was conceded — that Stephen had been making purchases in his own name up to the time when the goods, mentioned in the plaintiff's declaration, were purchased. *Judgment on the verdict.*<sup>1</sup>

## VAISE *v.* DELAVAL.

KING'S BENCH. 1785.

[Reported 1 *Term Reports*, 11.]

UPON a motion by Law for a rule to set aside a verdict, upon an affidavit of two jurors, who swore that the jury, being divided in their opinion, tossed up, and that the plaintiff's friends won, in which was cited, *Hale v. Gove*, 1 Stra. 642.

*Per* Lord MANSFIELD, Ch. J. The Court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor: but in every

<sup>1</sup> See *Hraba v. Maple Block Coal Co.*, 154 Ia. 710, 135 N. W. 406; *Hix v. Drury*, 5 Pick. (Mass.), 296; *O'Brien v. Merchants' Ins. Co.*, 48 How. Pr. (N. Y.), 448; *Pittsburgh v. Pittsburgh Rys. Co.*, 234 Pa. 223, 83 Atl. 273, Ann. Cas. 1913 C. 933.

For the statutes in the several states on this subject, see 2 Thompson, *Trials*, 2d ed., sec. 2595. — Ed.

such case the Court must derive their knowledge from some other source; such as from some person having seen the transaction through a window, or by some such other means. *Rule refused.*

## WRIGHT v. ABBOTT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1894.

[Reported 160 *Massachusetts*, 395.]

MOTION for a new trial of an action of replevin, on the ground of misconduct of the jury, which consisted by agreement of eleven jurors, who returned a verdict for the plaintiff in the Superior Court.

At the hearing upon the motion, before Richardson, J., the defendant called as a witness John W. Tilton, a deputy sheriff, who had the charge of the jury during their deliberations on the case in their room; and, against the objection of the plaintiff, he testified substantially as follows:

"I heard their deliberations. I overheard what was said by them in the jury room. I heard the jury discussing the case, and I heard them state the result of a ballot. I heard one juror say that eleven ballots should be put into a hat, eight marked for the defendant, three marked for the plaintiff, that one member of the jury should be blindfolded and draw out a ballot, and that the jury should agree upon the result of the ballots so drawn out; then I heard them getting ready to take the ballot and to do it; there was a silence or pause after that during which something was being done apparently; and I heard the matter talked over by them after it was done, and I heard the result. I heard it stated by one of the jurors that the ballot drawn out was for the plaintiff. I heard these words, 'The ballot drawn out is for the plaintiff.' Shortly after, in a few minutes, the foreman rapped upon the door, and said the jury had agreed. The jury immediately came into the court and rendered the verdict."

It appeared that the witness was not actually inside the jury room when he heard their conversation testified to.

The plaintiff asked the judge to rule that the evidence of Tilton was incompetent, and inadmissible on the motion for a new trial; and that it was insufficient to set aside the verdict.

The judge refused so to rule; found that chance or lot was resorted to by the jury in making up their verdict, and that, before



it was done, they had agreed to abide by the result of drawing lots as to the verdict which they should render; and set aside the verdict, and granted a new trial.

The plaintiff alleged exceptions.

FIELD, C. J. The single question in this case is whether, on a motion for a new trial on account of the alleged misconduct of the jury, it is competent for a deputy sheriff who had the charge of the jury during their deliberations in the jury room to testify to what he heard said and done by the jury, in the jury room, for the purpose of showing that the jury decided the case by lot, or by the drawing of a ballot from a hat in which ballots had been put, some marked for the plaintiff and some for the defendant.

It is certainly not the duty of an officer in charge of a jury to listen to the deliberations of a jury in the jury room; but if he does, his testimony cannot be excluded on the ground that his knowledge was obtained in this manner, if it is otherwise competent. The rule excluding testimony of the conduct of jurors in the jury room when deliberating upon a verdict ought to have some limits. It seems that, in England, it has been finally settled that the affidavit of a juror will not be received to show that the verdict was determined by lot. *Vaise v. Delaval*, 1 T. R. 11. *Owen v. Warburton*, 1 B. & P. 326. *Straker v. Graham*, 7 Dowl. Pr. Cas. 223, 225. The weight of authority in this country also is that the affidavits or the testimony of jurors to show such a fact will not be received. *Dana v. Tucker*, 4 Johns. 487. *Cluggage v. Swan*, 4 Binn. 150. *Brewster v. Thompson*, Coxe, 32. *Grinnell v. Phillips*, 1 Mass. 530, is regarded as overruled in *Woodward v. Leavitt*, 107 Mass. 453, 461, 462. It has always been held that, if a verdict is obtained by resorting to chance or by drawing lots, it will be set aside. *Mitchell v. Ehle*, 10 Wend. 595. *Donner v. Palmer*, 23 Cal. 40. *Ruble v. McDonald*, 7 Iowa, 90. *Birchard v. Booth*, 4 Wis. 67. *Dorr v. Fenno*, 12 Pick. 521. *Forbes v. Howard*, 4 R. I. 364. In *Vaise v. Delaval*, *ubi supra*, where a verdict was obtained by tossing up, Lord Mansfield said: "The court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor; but in every such case the court must derive their knowledge from some other source; such as from some person having seen the transaction through a window, or by some such other means."

In *Wilson v. Berryman*, 5 Cal. 44, the verdict was what is called a quotient verdict, and the court, while conceding that the affidavit

of a juror could not be received, admitted the affidavit of the under sheriff that the affidavit of the juror was true.

Either the law that a verdict must be set aside if determined by lot is nugatory because the fact cannot be proved, or there must be a possible means of proving it. If, on grounds of public policy, the affidavits or the testimony of jurors concerning what took place in the jury room is excluded, as well as evidence of their subsequent declarations on the subject, still we are of opinion that independent evidence should be admitted, and that the consequences to be apprehended from admitting such evidence are less harmful than the consequences of forbidding all inquiry into such a matter. We think that the presiding justice properly refused to rule as requested.

*Exceptions overruled.*

### DANA v. TUCKER.

SUPREME COURT OF JUDICATURE OF NEW YORK. 1809.

[Reported 4 *Johnson's Reports*, 487.]

THIS was an action for a *breach of promise of marriage*, tried at the last Madison circuit, when the jury found a verdict for the plaintiff, for 439 dollars and 58 cents.

*Gold* now moved to set aside the verdict, for the misbehaviour of the jury. He read the affidavit of the constable, who was sworn to attend the jury, while they retired to deliberate on their verdict, who stated, that the jurors agreed, that each of them should mark down such sum as he thought fit to find, and the sum total being divided by twelve, the quotient should be the verdict; and that the verdict was so ascertained.

Similar affidavits of two of the jurors, were also read.

*N. Williams, contra*, read the affidavits of two other jurors, stating, that the jury, after some deliberation, unanimously agreed to find a verdict for the plaintiff; that each juror then privately marked the sum he was inclined to give; eight of them marked 500 dollars, one 600 dollars, and one 50 dollars. The sums so marked were added together, and the amount divided by twelve, and the sum produced by the division, they, afterwards, agreed should be their verdict. After the verdict was delivered in court, in the usual form, the jury were polled, and each of the jurors, on being asked whether he agreed to the verdict, declared his assent.

*Gold* objected, that these affidavits of the jurors could not be read. He cited the case of *Owen* and another *v. Warburton* (1 Bos. Pull. & N. S. 326).

*Williams* observed, that in the case of *Smith v. Cheetham* (3 Caines, 57) the court allowed the affidavits of jurors to be read; and that it would be unreasonable and unjust, to permit the solemn verdict of a jury to be set aside on the affidavit of an officer, as to their misconduct, without allowing the jurors to be heard in defence of their verdict. In the case of *Lawrence v. Boswell, Sayer*, 100, where seven of the jurors voted for the verdict, and the other five made no objection, when the verdict was given, the court refused to set it aside.

*Per Curiam.* The better opinion is, and such is the rule adopted by the court, that the affidavits of jurors are not to be received to impeach a verdict; but they may be admitted in exculpation of the jurors, and in support of their verdict. Rejecting the affidavits of the two jurors against the verdict, there is the affidavit of two other jurors in favour of the verdict, which must outweigh that of the constable. If the jurors previously agree to a particular mode of arriving at a verdict, and to abide by the contingent result, at all events, without reserving to themselves the liberty of dissenting, such a proceeding would be improper; but if the means is adopted merely for the sake of arriving at a reasonable measure of damages, without binding the jurors by the result, it is no objection to the verdict. Such appears to have been the case here; and after the result of the division was known, they individually assented to the sum, as their verdict. The motion must be denied.

\* *Rule refused.*<sup>1</sup>

<sup>1</sup> See *Campbell v. Brown*, 85 Kan. 527, 117 Pac. 1010.

For a discussion of compromise verdicts, see *Simmons v. Fish*, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912 D. 588, where the court, Rugg, C. J., said: "A verdict which is the result of real harmony of thought growing out of open-minded discussion between jurors with a willingness to be convinced, with a proper regard for opinions of others and with a reasonable distrust of individual views not shared by their fellows and a fair yielding of one reason to a stronger one, each having in mind the great desirability of unanimity both for the parties and for the public, is not open to criticism. But a verdict which is reached only by the surrender of conscientious convictions upon one material issue by some jurors in return for a relinquishment by others of their like settled opinion upon another issue and the result is one which does not command the approval of the whole panel, is a compromise verdict founded upon conduct subversive of the soundness of trial by jury. The jury room cannot be entered in order to ascertain what has transpired there. Its deliberations are in secret, and ordinarily cannot be made the subject of testimony by jurors. *Woodward v. Leavitt*, 107 Mass. 453. What went on there may be learned by other sources.



## SECTION X.

*The Verdict.*

## AMERICAN PUBLISHING COMPANY v. FISHER.

SUPREME COURT OF THE UNITED STATES. 1897.

[Reported 166 *United States*, 464.]

ON April 29, 1891, plaintiffs in error commenced an action in the District Court of Salt Lake County, Territory of Utah, to recover of defendants the sum of \$20,844.75 on a contract for furnishing labels, cards, etc. After answer the case came on for trial before a jury on December 10, 1892, and resulted in a verdict in favor of the defendants, signed by nine jurors, the others not concurring. Judgment was rendered upon this verdict, which was sustained by the Supreme Court of the Territory. 10 Utah, 147.

This action of the trial and Supreme Courts in sustaining a verdict returned by only nine of the jurors was under the authority

Wright v. Abbott, 160 Mass. 395. It is not infrequently possible to determine with some approximation to accuracy what went on there from the result produced. This is such a case. It seems plain from the record that this was a compromise verdict. The issue of liability was contested at the trial. There was no contest as to the injury done. It was such as necessitated the removal of the eye of a boy under twenty-one years of age. He must go through life, which may be a long one, disabled and disfigured. The severity of the injury need not be elaborated, for it is beyond contention. The damages under the law, if liability was established, should have been assessed not according to the degree of culpability of the defendant, but solely upon the basis of compensation to the plaintiff. The single question was what was the money value to be awarded to a boy for the loss of an eye. The jury said \$200. It is inconceivable that any jury, having agreed upon the issue of liability, should have reached such a determination as to damages. They had no right to consider the subject of damages until they had settled the liability in favor of the plaintiff. The verdict itself is almost conclusive demonstration that it was the result, not of justifiable concession of views, but of improper compromise of the vital principles which should have controlled the decision. The inference is irresistible that it could have been reached only by certain of the panel conceding their conscientious belief that the defendant ought to prevail upon the merits in order that a decision might be reached."

As to the admissibility of the affidavits of jurors to show their own misconduct, see *Clum v. Smith*, 5 Hill (N. Y.), 560; *Mais v. Ruh*, 57 N. Y. App. Div. 15, 67 N. Y. Supp. 1051 (affidavit of third person as to statements by jurors); *Inhabitants of Bridgwater v. Inhabitants of Plymouth*, 97 Mass. 382; *Haun v. Wilson*, 28 Ind. 296 (waived); *Sanitary District v. Cullerton*, 147 Ill. 385, 35 N. E. 723. But see *Wright v. I. & M. Tel. Co.*, 20 Ia. 195; 3 *Graham & Waterman*, New Trials, 1429; *Baylies*, New Trials, 543. — Ed.



of an act of the legislature of Utah, approved March 10, 1892 (Laws Utah, 1892, page 46), which provides as follows:

"SEC. 1. That section 3371 of the Compiled Laws of 1888, of Utah, is hereby amended so as to read as follows:

"SEC. 3371. In all civil cases a verdict may be rendered on the concurrence therein of nine or more members of the jury."

The bill of exceptions contains this recital in respect to an instruction and the verdict:

"The court further charges you that the concurrence of nine or more members of the jury is essential to your verdict, and that all who agree to it should sign it.

"(To which last charge the plaintiff duly excepted.)

"The jury having retired and deliberated, returned a written verdict into court on the 12th day of December, 1892, 'finding the issues for the defendant,' signed by nine (9) of its members — the others refusing to concur therein. Which verdict the court then and there received and caused to be entered upon the record.

"To which action of the court the plaintiff excepted."

Mr. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

As the amount in controversy is over \$5000 this court in any view has jurisdiction of the case, and may inquire into all matters properly preserved in the record. The recital in the bill of exceptions shows that proper exceptions were taken to the charge of the court in respect to the number of jurors whose concurrence was essential to the verdict, and also to its action in receiving and entering of record such verdict.

The territorial statute was relied upon as authority for this action. Its validity, therefore, must be determined. Whether the Seventh Amendment to the Constitution of the United States, which provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," operates *ex proprio vigore* to invalidate this statute, may be a matter of dispute. In *Webster v. Reid*, 11 How. 437, an act of the legislature of the Territory of Iowa dispensing with a jury in a certain class of common law actions was held void. While in the opinion, on page 460, the Seventh Amendment was quoted, it was also said: "The organic law of the Territory of Iowa, by express provision and by reference, extended the laws of the United States, including the ordinance of 1787, over the Territory, so far as they are applicable"; and the ordinance of 1787, article 2, in terms provided that "the inhabitants of the said

Territory shall always be entitled to the benefits of the writ of *habeas corpus*, and of the trial by jury." So the invalidity may have been adjudged by reason of the conflict with Congressional legislation. In *Reynolds v. United States*, 98 U. S. 145, 154, it was said, in reference to a criminal case coming from the Territory of Utah, that "by the Constitution of the United States (Amendment VI) the accused was entitled to a trial by an impartial jury." Both of these cases were quoted in *Callan v. Wilson*, 127 U. S. 540, as authorities to sustain the ruling that the provisions in the Constitution of the United States relating to trial by jury are in force in the District of Columbia. On the other hand, in *Mormon Church v. United States*, 136 U. S. 1, 44, it was said by Mr. Justice Bradley, speaking for the court: "Doubtless, Congress in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions." And in *McAllister v. United States*, 141 U. S. 174, it was held that the constitutional provision in respect to the tenure of judicial offices did not apply to territorial judges.

But if the Seventh Amendment does not operate in and of itself to invalidate this territorial statute, then Congress has full control over the Territories irrespective of any express constitutional limitations, and it has legislated in respect to this matter. In the first place, in the act to establish a territorial government for Utah, act of September 9, 1850, c. 51, § 17, 9 Stat. 453, 458, it enacted "that the Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah, so far as the same, or any provision thereof, may be applicable." A subsequent statute has more specific reference to jury trials. Act of April 7, 1874, c. 80, 18 Stat. 27. The first section of this act, after confirming the statutes of the various Territories so far as they authorize a uniform course of proceeding in all cases whether legal or equitable, closes with this proviso: "Provided, that no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law."

This, of course, implies not merely that the form of a jury trial be preserved, but also all its substantial elements. *Walker v. Southern Pacific Railroad*, 165 U. S. 593.

Therefore, either the Seventh Amendment to the Constitution, or these acts of Congress, or all together, secured to every litigant in a common law action in the courts of the Territory of Utah the right to a trial by jury, and nullified any act of its legislature which attempted to take from him anything which is of the substance of that right. Now unanimity was one of the peculiar and essential features of trial by jury at the common law. No authorities are needed to sustain this proposition. Whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is one abridging the right. It follows, therefore, that the court erred in receiving a verdict returned by only nine jurors, the others not concurring.

In order to guard against any misapprehension it may be proper to say that the power of a State to change the rule in respect to unanimity of juries is not before us for consideration. *Walker v. Sauvinet*, 92 U. S. 90; *Hurtado v. California*, 110 U. S. 516.

The judgment will be

*Reversed, and as the questions involved in the case are not of a Federal nature, and diverse citizenship is not alleged, the case must be remanded to the Supreme Court of the State for further proceedings.*<sup>1</sup>

## WEEKS v. HART.

SUPREME COURT OF NEW YORK, GENERAL TERM. 1881.

[Reported 24 *Hun*, 181.]

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury, and from an order denying a motion for a new trial made upon the minutes of the justice before whom the action was tried.

GILBERT, J. When the jurors were polled one of them responded that he was not satisfied with the verdict. The court asked the juror if he had not agreed to the verdict, and the juror responded that he had. The defendant's counsel objected to the entry of the verdict, the court overruled the objection and the defendant's counsel excepted. Whereupon the court directed the verdict to be

<sup>1</sup> See also *Rasmussen v. United States*, 197 U. S. 516, 49 L. ed. 862, 25 S. Ct. 514. And see an article on "Modifications of the Jury System" by Professor John Burton Phillips, in 16 *Green Bag*, 514. — Ed.

entered. That direction was clearly erroneous. The jury should have been sent back for further deliberation. The right of a juror to dissent from a verdict to which he had before agreed, is not lost until the verdict has been recorded. Any expression of dissent before that has been done, destroys the unanimity which is essential to make a verdict valid. *Labar v. Koplin*, 4 Coms. 550, and cases there cited; 3 Waite's Pr. 192.

This error being decisive it is unnecessary to consider the other questions presented.

The judgment and order must be reversed and a new trial granted, with costs to abide the event.

BARNARD, P. J., concurred; DYKMAN, J., not sitting.

Judgment and order denying new trial reversed and new trial granted, costs to abide event.<sup>1</sup>

### FOX v. SMITH.

SUPREME COURT OF NEW YORK. 1824.

[Reported 3 Cowen, 23.]

E. GRIFFIN, for the defendant, moved to set aside the verdict in this cause, which was rendered for the plaintiff at the last Jefferson Circuit, under the following circumstances: The trial not being closed till evening, it was agreed by the counsel for the parties, that the jury might bring in their verdict sealed the next morning, which was accordingly done. On the jury coming into the box the next morning, and presenting their verdict sealed, the defendant's counsel requested of the Judge to have the jury polled, which he denied, and the verdict was recorded.

WOODWORTH, J. Conceding that the Judge may order the jury polled, seems to give the party a right to insist on it. I think this cannot be a matter of mere discretion. It has been the uniform practice at the Circuit, as far as I have been acquainted with it, to allow the jury to be polled, whether the verdict be sealed, as here, by consent, or delivered *ore tenus* by the foreman.

<sup>1</sup> *Owens v. Southern Ry. Co.*, 123 N. C. 183, 31 S. E. 383; *Frick v. Reynolds*, 6 Okl. 638, 52 Pac. 391; *Scott v. Scott*, 110 Pa. 387, 2 Atl. 531, *accord*.

Compare *Hill v. State*, 64 Ga. 453; *McCoy v. Jordan*, 184 Mass. 575, 69 N. E. 358; *Lowe v. Dorsett*, 125 N. C. 301, 34 S. E. 442.

A juror may dissent from the verdict although the jury is not polled. *Lawrence v. Stearns*, 11 Pick. (Mass.), 501. — ED.



*Curia.* We think the jury may be polled, at the instance of either party, at any time before the verdict is recorded, whether it be sealed, by consent, or is *oral*. *Motion granted.*<sup>1</sup>

### BISHOP *v.* MUGLER.

SUPREME COURT OF KANSAS. 1885.

[Reported 33 *Kansas*, 145.]

JOHNSTON, J. The district court of Saline county granted a peremptory writ of mandamus against the plaintiff in error, who is a justice of the peace of said county, commanding him to receive and file a verdict alleged to have been agreed upon by a jury in a certain cause tried before him as a justice of the peace, where the defendant in error was plaintiff and one William Huebner was defendant. From the pleadings and the evidence in the record, it fairly appears that the cause was submitted to the jury late in the evening, and the justice of the peace, with the consent of the counsel, instructed the jurors that if they agreed upon a verdict during the night, they might seal the same and separate, returning the verdict into court on the next morning at nine o'clock, to which time the court adjourned. The jury reached an agreement during the night, when the verdict was signed and given to the bailiff, and the jurors dispersed. The bailiff carried the verdict in his pocket for a short time, and then returned and deposited it upon a desk in the office of the justice of the peace. The attention of the justice of the peace was called to it in the morning, and he was informed that it was the verdict agreed upon the previous night. Upon the convening of the court, on the next morning, the jury failed to appear, and the justice directed the bailiff to bring the jury into court. After some effort to find the jurors, the bailiff returned and reported that only four of the jurors could be found. It was then suggested that the verdict which had been returned by the bailiff to the justice be received and filed, but the counsel for defendant objected to its reception, because it had been out of the hands of the jury, and insisted that it could not be received unless presented by the jury, with all of the jurors present. The court was then adjourned until three o'clock of the afternoon of the same day, and

<sup>1</sup> *Smith v. Paul*, 133 N. C. 66, 45 S. E. 348, *accord.* *Ropps v. Barker*, 4 Pick. (Mass.), 239, *contra*.

As to the time when the motion must be made see *Zimmerman v. Detroit, etc., Co.*, 113 Mich. 1, 71 N. W. 321; *Rottmund v. Pa. R. R. Co.*, 225 Pa. 410, 74 Atl. 341; 22 *Encyc. of Pl. & Pr.* 935. — Ed.

the bailiff was instructed, in the meantime, to make search for the absent jurors and bring them into court at that time. The court reconvened at 3 P. M., when five of the jurors appeared, the bailiff reporting that he was unable to find one of the jurors, or learn anything of his whereabouts. The justice then refused to receive the verdict, declared a mis-trial, discharged the jury, and continued the case for future disposition. Whereupon, the defendant in error instituted this proceeding in mandamus, and obtained a peremptory writ as above stated. The plaintiff alleges error.

The question presented for our determination is, was it the duty of the justice of the peace to receive and file the verdict brought into court in the manner hereinbefore stated, and can its reception and filing be compelled by mandamus? It will be observed that the agreement of counsel and the direction of the court did not go further than to permit the jury, when they had agreed upon a verdict, to seal it, and separate for the night. This did not operate as a discharge of the jury, but it remained in existence as an organized body, and it was the duty of the jurors to have appeared at the convening of the court the following morning, and there, through their foreman, to present and publicly announce the verdict previously agreed upon. The permission to seal the verdict and separate for the night, did not dispense with the necessity of their attendance upon the court at the time to which it had adjourned. The determination of a jury, although formally stated in a verdict, and signed and sealed, is not final with them, but it remains within their control and subject to any alteration or amendment they desire to make, until it is actually rendered in court and recorded. It is well settled that any member of the jury is at liberty to withdraw his consent from a verdict already agreed upon, at any time before it is received and recorded (*Root v. Sherwood*, 6 Johns. 68; *Proffatt on Trial by Jury*, § 449), and until a sealed verdict is properly received and recorded in court, it is without force or validity. *Proffatt on Trial by Jury*, § 460. Except by consent, the verdict can only be rendered by a full jury. Every member should be present when it is received, so that the parties may avail themselves of the right to examine each juror, and learn if he concurs in the verdict announced. The main purpose in requiring the jury to bring in their verdict, and personally present it in open court, is that the parties may have an opportunity to poll them, or to correct any informality found in the verdict presented. The polling of the jury is not a mere matter of discretion with the court, but is an absolute right of the parties to the

suit. It was said in *Maduska v. Thomas*, 6 Kas. 159, "that in all cases a party has a right to know whether a supposed verdict is the verdict of each juror, or of only one or more of the jury; and if §§ 283 and 284 of the civil code do not apply where the jury decide without retiring from the jury-box, still the common law would give each party a right to know the verdict of each juror." See also *Thornburgh v. Cole*, 27 Kas. 490. Of course some of these requirements and rights might have been waived and dispensed with by the agreement or conduct of the parties. Here there was no such agreement or waiver. The defendant in the action stood upon his rights, and strenuously objected to the reception of a verdict unless it was regularly presented by the jury as an organized body, with every member present. With the aid of the bailiff five of the jurors were found and brought into court, but the sixth could not be found. The determination of the five jurors was not a valid verdict, and the court could not receive it as such. *Maduska v. Thomas*, *supra*.

There has been no brief filed or argument made in this court in behalf of the defendant in error; but it is stated that to support his application for the writ, he relied upon the case of *Munkers v. Watson*, 9 Kas. 668. It is not authority in this case. There the verdict was unanimously agreed upon by the jury, reduced to writing in due form, returned by the jury, and regularly presented to the court, but for insufficient reasons the court refused to receive and enter the same. In this case, contrary to the injunction of the court, the jury disbanded before the rendition of a verdict, and as they did not assemble again, no valid verdict could be rendered by them. That which was returned was not a verdict, and therefore the court cannot be compelled by mandamus to receive and file it.

Some question is raised as to whether the court should not have compelled a more extended search, and a greater effort to secure the attendance of the absent juror. It would seem that a reasonable effort was made to bring the jury together, but that question cannot be determined in this proceeding, which is brought for the purpose of compelling the reception and filing of an alleged verdict, and not to compel the re-assembling of the jury.

The judgment of the district court will be reversed.<sup>1</sup>

All the Justices concurring.

<sup>1</sup> Compare *Humphries v. District of Columbia*, 174 U. S. 190, 43 L. ed. 944, 14 S. Ct. 637.

As to whether the consent of the parties to a sealed verdict is necessary, see

## KRAMER v. KISTER.

SUPREME COURT OF PENNSYLVANIA. 1898.

[Reported 187 *Pennsylvania*, 227.]

MITCHELL, J.<sup>1</sup> . . . The jury having agreed to a sealed verdict separated, and the next morning the verdict was handed up, opened and announced, but on the jury being polled one juror dissented, whereupon the judge sent them out again with some strong remarks on keeping them until they had agreed. In a short time they returned with the same verdict as the one sealed, and it was received and recorded against the defendant's objection.

The practice of allowing the jury to seal a verdict and then separate is very general throughout the United States. Seventy-five years ago Chief Justice GIBSON spoke of it as in common use in Pennsylvania, having grown out of and superseded the privy verdict known to the common law, which was delivered to the judge out of court: *Dornick v. Reichenback*, 10 S. & R. 84. Both forms were alike in being without binding force as verdicts until delivered by the jury in court. All the authorities agree that the only verdict is that which the jury announce orally in court, and which alone is received and recorded as the jury's finding: *Dornick v. Reichenback*, *supra*; *Scott v. Scott*, 110 Pa. 387; *Com. v. Breyessee*, 160 Pa. 451. The authorities also agree that, as the only verdict is that announced by the jury in court, if with or without a poll any juror disagree, there is no verdict: *Scott v. Scott*, *supra*. But the course to be pursued in such case is an open question upon which we have no direct authority in this state. A verdict which is merely defective in form, whether sealed or not, and whether the jury have separated or not, may before it is recorded be recommended to them for correction, as for example to calculate the interest where they have found for plaintiff for a sum certain "with interest": *Wolfran v. Eyster*, 7 W. 38; *Reitenbaugh v. Ludwick*, 31 Pa. 131. But for a defect in substance where the jury has separated, and *a fortiori* for a defect that prevents the jury's delivery from being a verdict at all, as where the dissent of one

Bunker Hill, etc., *Co. v. Schmelling*, 24 C. C. A. 564, 79 Fed. 263; 22 *Encyc. of Pl. & Pr.* 1006.

In Iowa by statute if the parties consent to a sealed verdict, the sealing is equivalent to the rendition and recording in open court. See *Dunbould v. Thompson*, 109 Ia. 199, 80 N. W. 324. — Ed.

<sup>1</sup> The statement of facts and a part of the opinion are omitted. — Ed.



shows that it is not unanimous, whether the judge should treat it as a mistrial and discharge the jury, or whether he may send them out to consider a verdict anew, is undetermined. A few collateral intimations and dicta seem to point to the former as the proper course, but we have no decision. Thus in *Wolfran v. Eyster*, 7 W. 38, *supra*, the court expressly limited the decision to "amending mere defects of form, not substantially changing the finding of the jury." And in *Scott v. Scott*, 110 Pa. 387, *supra*, where the associate judges entered a sealed verdict notwithstanding the dissent of one juror on a poll, this Court held it error, saying, "Of course had the learned president judge been present the verdict of eleven jurors would not have been entered on the record. Unless all the jurors were agreed he would have discharged them because of their disagreement." The authorities cited by appellee from our criminal cases, *Alexander v. Com.*, 105 Pa. 1, *Moss v. Com.*, 107 Pa. 267, *Hilands v. Com.*, 111 Pa. 1, and *Com. v. Eisenhower*, 181 Pa. 470, refer to separation of the jury during the trial, and do not touch the present inquiry. Nor is there any settled rule in other states to which we may conform. In New York the imperfect verdict is treated as a nullity for all purposes, and the jury may be sent out to deliberate again: *Douglass v. Tousey*, 2 Wend. 352. In Ohio this cannot be done: *Sutliff v. Gilbert*, 8 Ohio, 405. It would seem to be a question of practice as to which there is no uniformity.

We are thus left to consider the subject on historical and general principles, as to the origin and proper extent of the practice. At common law the jury were kept together from the time they were sworn, as is still the general rule in criminal cases involving life. After they had retired to consider their verdict they were kept without food, drink, fire or light, until they agreed, and Blackstone says, "It has been held that if the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or imprisoned, the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart": 3 Blacks. Com. 376. From the manner of this mention it is to be inferred that this latter practice was at least unusual in Blackstone's day, and he says expressly that the deprivation of food, fire and light was subject to the indulgence of the court. In relief of the jury the privy verdict was recognized, though not often resorted to. "A privy verdict is when the judge hath left or adjourned the court, and the jury, being agreed, in order to be delivered from their confinement, obtain leave to deliver their verdict privily to the judge out of court; which privy

verdict is of no force unless affirmed by a public verdict given openly in court; wherein the jury may if they please vary from the privy verdict. So that the privy verdict is indeed a mere nullity; and yet it is dangerous practice, allowing time for the parties to tamper with the jury, and therefore very seldom indulged": 3 Blacks. Com. 377. With the prolongation of trials in the more complicated issues of modern times, and especially with the amelioration of manners, the treatment of jurors has gradually become less harsh, and changes of practice have been made in their relief. It is no longer the custom to keep them together and secluded during the whole trial, though I apprehend that the judge may do so in any case where public excitement or other exceptional reason may make it advisable in the interest of the proper administration of justice to do so, and it is firmly established that in trials involving life he must do so, unless in exceptional and very limited cases of necessity. After the retirement of the jury to consider their verdict this indulgence terminates, and they are kept together and apart from others until verdict rendered. But if the adjournment of the court is to such time or under such circumstances as seem likely to lead to serious inconvenience to the jurors, the practice of allowing them to seal a verdict grew up, as said by GIBSON, C. J., in *Dornick v. Reichenback*, 10 S. & R. 84, *supra*, in place of the privy verdict. It had the same disadvantage of not being binding, and was therefore subject to the same dangers. By the recognized practice however, it is within the discretion of the judge, which does not require any agreement of parties or counsel, and may be exercised without their consent. But it is part of the growth of modern practice in relief of the hardships and inconvenience to which jurors are necessarily subjected, and cannot be carried beyond the point of reasonable safety to the administration of justice. No jury can demand it as a right in any case, and in certain cases no judge can grant it as a matter of grace. The necessity that the verdict shall not only be fair and unbiased, but beyond reasonable apprehension of danger that it is otherwise, must be the controlling element in determining the limits of the convenience of the jurors and the discretion of the judge. When a juror dissents from a sealed verdict there is a necessary choice of evils, a mistrial or a verdict finally delivered under circumstances that justly subject it to suspicion of coercion or improper influences. We are of opinion that the former is the lesser evil. If one juror can dissent, so may all change their view and render a new verdict exactly opposite to the one they first agreed upon and

sealed. There could be no better illustration of the dangers of such a privilege than the present case. If the dissenting juror was honest in his declaration that he had not agreed to the first verdict except because he thought he was obliged to, then his agreement to the second without having been instructed as to his rights cannot be freed from a well founded appearance of coercion. If on the other hand the second verdict had been for the defendant, contrary to the first, the inference could hardly have been escaped that the change was produced by new evidence or information illegally acquired by the dissenting juror or by even more reprehensible means. The only safe way out of such a situation is to treat it as a mistrial and discharge the jury.

*Judgment reversed and venire de novo awarded.*

SPENCER *v.* WILLIAMS, Administrator.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1893.

[Reported 160 *Massachusetts*, 17.]

CONTRACT, against the administrator of the estate of Polly Crosby, upon a promissory note for \$2,500, payable to the plaintiff, and signed "P. Crosby." The answer, among other defences, denied the genuineness of the signature to the note. Trial in the Superior Court, before Hopkins, J., who allowed a bill of exceptions, in substance as follows.

At the close of the trial, the judge of his own motion submitted to the jury the following question: "Did Polly Crosby sign the note set out in the plaintiff's declaration?"

The case was given to the jury in the afternoon, and, before the jury had agreed on their verdict, the court was adjourned until the following morning, the judge instructing the officer in charge that, when the jury agreed, they should seal their verdict and then be allowed to separate and render their verdict at the opening of the court on the following day.

The jury agreed upon a verdict for the defendant soon after the adjournment, and sealed up their verdict signed by the foreman.

At the opening of the court on the following morning, the jury, having been separated over night, were reassembled and presented the sealed package to the court, and on the opening of the same it appeared that the verdict was rendered for the defendant, but the question above stated had not been answered.



Before the verdict was declared, the judge instructed the jury that they should answer the question, and directed them to retire and make such answer. The jury thereupon retired, and afterwards returned into court with the verdict for the defendant and an answer to the question in the negative.

The plaintiff, on the same day, moved to set aside the answer to the question, on the following grounds:

"1. That, before said question had been answered by the jury, the jury separated and remained separate over night at their various homes. 2. That before the foreman of the jury had signed said question and answer in the negative, the jury separated and remained separate at their several homes over night. 3. That said question was returned into court unanswered, and before said question was answered, and more than twelve hours after said separation, the jury, as required by the court, reassembled in their room, and that then for the first time said question was answered by the jury and signed by the foreman."

At the hearing on the motion, the plaintiff asked the judge to rule, as matter of law, that the answer to the question could not be maintained, and to grant the motion.

The judge declined so to rule, and overruled the motion; and the plaintiff alleged exceptions.

BARKER, J. The plaintiff contends that upon a jury trial the presiding justice has no power to receive the answer of the jury to a question which he has required them to answer in connection with their verdict, if the jury has been allowed to separate without reducing to writing their answer to the question. One of the most important reasons for requiring juries to remain together after the cause is finally committed to them until they have agreed upon their verdict is, that they may reach their conclusions only upon the law and the evidence given them, uninfluenced by other matters. Distinct questions submitted to them are in connection with their verdict, and of such a nature that the jury cannot properly arrive at a verdict except upon consideration and determination of the specific questions. When, therefore, as in the case at bar, the verdict has been arrived at, and reduced to writing and signed by the foreman, before the separation of the jury, it is to be inferred that they have before their separation considered the specific questions submitted, and arrived at an agreement as to the answer to be given. If by mistake or inadvertence the answer has not been reduced to writing and signed before the separation, we think it is still within the power of the court to require the jury to



answer the question, and to receive and record the answer in connection with the verdict. As stated in *Mason v. Massa*, 122 Mass. 477, 480. "It is a well settled and long established practice that a jury, when they have returned a finding that is incomplete and defective, may be sent out again in order to correct the error, even though they had separated after their first finding before they came into court." An omission to assess damages was thus properly cured in the case cited, and also in *Chapman v. Coffin*, 14 Gray, 454. In the former case the proper assessment of damages required only the arithmetical computation of the amount of a note and interest, but in the latter the foreman said to the court that before they first separated they concluded that the damages would be the amount of the plaintiff's account and interest, which was the correct basis for the assessment of damages. We are therefore of opinion that in the case at bar there were good grounds to infer that the answer of the jury to the specific question had been determined upon by the jury in connection with arriving at their verdict and before their separation, and that under the circumstances, upon the motion for a new trial, the presiding justice was not required to rule as requested by the plaintiff.

We assume that, if he had had reason to suppose that the jury had not considered the question and determined how to answer it before their separation, the presiding justice would not have again sent them out with instructions to make their answer.

*Exceptions overruled.*<sup>1</sup>

### COGAN *v.* EBDEN and Another.

KING'S BENCH. 1757.

[Reported 1 *Burrow*, 383.]

ON a motion (made the 18th instant), to set aside a verdict as being given in by the foreman, contrary to the opinion and intention of eight of the jury. It appeared that the defendant justified under a right of a way, over the plaintiff's ground, to two closes of the defendant, *viz.* Broadmoor, and Three Acres; upon which two different issues were joined; *viz.* one upon the right of a way to Broadmoor; the other upon the right of a way to the Three Acres. And the foreman gave in the verdict, as a general verdict for the

<sup>1</sup> See *Clark v. Sidway*, 142 U. S. 682, 35 L. ed. 1157, 12 S. Ct. 327.

See also 38 Cyc. 1892; 22 Encyc. of Pl. & Pr. 1011. — Ed.

defendant, upon both issues. But eight of the jury made affidavit, "That it was the meaning and intention of the whole jury, to find the former issue for the defendant; and the latter for the plaintiff: and that this mistake was discovered by them an hour afterwards; but not till the judge was gone to his lodgings." And upon the judge's report, it appeared that though there was indeed evidence on both sides, yet the weight of the evidence was (as it appeared to him) on the side of the plaintiff, as to this latter issue.

*N.B.* The foreman had declined making any affidavit; because, he said, he should make himself appear a fool to the Court of King's Bench.

This matter was much litigated by the counsel on both sides. And the counsel for the plaintiff mentioned the case of *Baker v. Miles*, in C. B. in M. 4 G. 2. S. P. where eleven of the jurymen swore "that the foreman had mistaken their verdict"; and it was thereupon set aside.

The Court were all clear that this was a mistake, arising from the jury's being unacquainted with business of this nature; and from the associate's omission in not asking the jury particularly, "how they found each respective issue," and in not making the jury fully understand their own finding; and that it was agreeable to right and justice that the mistake should be rectified. And they had no doubt about the fact of this mistake, from the affidavit of the eight jurymen, confirmed (as they held it in effect to be) by the foreman's declining to make any affidavit at all: especially as the judge's notes shewed the weight of the evidence to have been for the plaintiff as to this latter issue.

And Lord Mansfield and Mr. Just. Denison thought that as it was a mere slip, there might be some method of rectifying the verdict according to the truth of the case; from the judge's notes, if they were sufficiently particular; without sending the issue to be tried over again at a great expence.

And the case of *Newcombe v. Green*, in 2 Strange 1197, was mentioned, where the *postea* was amended by the Judge's notes. And Lord Mansfield said that, at least, they could set aside the verdict without costs. But difficulties occurring how the costs would be in such case, as one issue was still found for, and was in truth clearly for the defendant; therefore *Cur. advis'*.

And now Lord Mansfield seeing Mr. Morton in court, who was concerned for the plaintiff, and had (on his behalf) moved to set aside the verdict, took occasion to mention this case, and said they had thought of it; and he had talked with his brother Wilmot

too about it: but, however, he was not now going to give any opinion; but only to propose what seemed to him the most proper method of coming at it.

The case of *Newcombe v. Green* itself, is not applicable to this case. But there is another case of *Mayo v. Archer*, in 1 Strange 514, 515; where the question was, "Whether a farmer who bought and sold potatoes could be a bankrupt": and the special verdict did not set forth the quantities he had bought and sold; though they were proved at the trial. The court did not there award a *venire facias de novo*; but amended the special verdict in that respect; which case is more applicable to the present case than that which was cited: For here they ordered the special verdict to be amended; though the plaintiff's motion was only "that a *venire facias de novo* might be awarded."

But another case has been mentioned to me, which is applicable to the principle of this case; though not like the particular fact. It is that of *Dayrell v. Bridge*, Tr. 22 G. 2. B. R. trespass for cutting down an oak-tree. The defendant pleaded several pleas; one of which was, "Not Guilty." At the trial, a general verdict was taken down, and so entered. And the court rectified the verdict, by expunging the finding on all but the "Not Guilty"; it appearing that nothing was in question (at the trial) but "whether the place where the tree stood was parcel of the manor or not." In the case of *Newcombe v. Green*, several cases were cited on the same subject: though the case itself is not the present case.

If the court sets the matter right, they should proceed according to the whole truth of the case. The judge who tried the cause agrees to the fact disclosed in the affidavit of the eight jurymen: whereas your first affidavit on which the rule was made, was an affidavit of only four of them.

Therefore what I would propose is, that you should make your motion, and have a rule to shew cause, why, upon reading the affidavits of these eight jurymen, the verdict should not be amended and set right according to the truth of the finding.

Note — Such a motion was afterwards made; and a rule to "shew cause" granted; but it never came before the court any more: it plainly appearing that the court, upon deliberation among themselves, had come to an opinion, "that in this shape the verdict might be set right."

DALRYMPLE *v.* WILLIAMS *et al.*

COURT OF APPEALS OF NEW YORK. 1875.

[Reported 63 *New York*, 361.]

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, reversing an order of Special Term correcting the verdict as entered.

This action was for fraud. The foreman of the jury announced as their verdict a general verdict in favor of plaintiff against both defendants, and it was so entered. Upon application, made upon the same day to the judge holding the Circuit, on behalf of defendant Williams, an order to show cause at a day specified, during the same Circuit, why the verdict should not be corrected was granted. The application was based upon the affidavits of all the jurors stating, in substance, that the verdict as agreed upon by them was in favor of defendant Williams and against the other defendant, for the amount named in the verdict entered, and that the announcement of the foreman was made through mistake and inadvertence. The court, upon hearing under the order to show cause, directed the verdict to be amended so as to conform to the actual finding.

ALLEN, J. If the fact alleged is properly before us, there should be no doubt either as to the right of the plaintiff to have or the power of the court to grant the relief demanded. It would be a reproach upon the administration of justice if a party could lose the benefit of a trial and a verdict in his favor by the mere mistake of the foreman of the jury in reporting to the court the result of the deliberations of himself and his fellows. The power of a court of record over its records, and to make them truthful, is undoubted, and has been exercised without question. See cases cited by Judge HARRIS, in *Burhans v. Tibbits*, 7 How. Pr. Rep., 21. The question whenever the court is asked to reform its records so as to conform to the truth, is not as to the power, but whether a case is made calling for its exercise.

The material question here is, whether the affidavits of the jurors can be received to show the mistake. If they were properly before the court the fact alleged was clearly established and is uncontradicted, and in addition we have the fact that the judge at the Circuit was satisfied of the mistake, and that the defendant was entitled to the correction asked, else he would have denied the motion altogether or modified the relief demanded, by merely granting a new trial. It was competent to give relief in either form,



and had the judge doubted as to the right or the equities of the case he would have only set the verdict aside and put the parties to a new trial.

There are reasons of public policy, why jurors should not be heard to impeach their verdicts, whether by showing their mistakes or their misconduct. Neither can they properly be permitted to declare, with a view to affect their verdict, an intent different from that actually expressed by the verdict as rendered in open court. In early times the pains and penalties visited upon jurors for false verdicts furnished an additional reason why they should not be allowed to impeach them. *Watts v. Brains, Cro. Eliz.*, 778. But the rule is well established, and at this day rests upon well understood reasons of public policy as connected with the administration of justice, that the court will not receive the affidavits of jurymen to prove misconduct on their part, or any act done by them which could tend to impeach or overthrow their verdict. This rule excludes affidavits to show mistake or error of the jurors in respect to the merits, or irregularity or misconduct, or that they mistook the effect of their verdict and intended something different. *Clum v. Smith*, 5 Hill, 560; *Ex parte Caykendoll*, 6 Cow., 53; *The People v. Columbia Common Pleas*, 1 Wend., 297; *Jackson v. Williamson*, 2 T. R., 281; *Davis v. Taylor*, 2 Chitty, 268; *Vaise v. Delaval*, 1 T. R., 11. None of these decisions or the principles upon which they rest are decisive of the precise question now presented. They only decide that the verdict to which the jurors have once assented, and which they have reported to the court, cannot be impeached or set aside upon their declaration or affidavit. But the question is quite different when the allegation is that they have been misunderstood by the court, or erroneously reported to it, and that the entry made is not and was not their verdict. It is not an attempt to reverse their action in the jury room but to establish it. It is in the nature of an attempt to correct a clerical mistake. Had the jury rendered a sealed verdict, and their clerk or scrivener made a mistake in reducing it to writing, a correction of the writing after it had reached the court and been entered upon the minutes would be no impeachment of the verdict or of the integrity, intelligence or action of the jury. The jury in furnishing proof of the clerical mistake would stand by their agreement and aid in giving effect to their deliberations and determinations. In the case now before us it is merely sought to prove by the affidavits of the jurors that by an accident, without intentional fault, the verdict of the jury was erroneously delivered to

and received by the clerk. I am unable to see in this an infringement of the rule forbidding jurors to impeach their verdicts; neither can I perceive serious danger in any practice that may grow up under such an exception to the general rule. Applications of this character will be rare, will be made before the judge presiding at the trial and while the whole subject is fresh in the minds of all, and never will be granted except in cases free from reasonable doubt. Something must always be trusted to the discretion of the judge. Discretion cannot be withheld in all cases because it may sometimes be abused. We are not without precedent to justify the reception of and acting upon the affidavits of the jurors in this case. In *Cogan v. Ebdon* (1 Burr., 383), a verdict wrongly delivered by the foreman was set right upon the affidavit of eight of the jury. *Sargent v.* — (5 Cow., 106), went farther than the court was asked to go here. Affidavits of the jury were received to show that they were misled and adopted a principle in estimating damages not allowed by law. This was defended and approved in *Ex parte Caykendoll* (*supra*).

In *Jackson v. Dickenson* (15 J. R., 309), affidavits of jurors were held admissible to show that a mistake had been made in taking their verdict, and that it was entered different from what was intended. The court draw a distinction between what transpires while the jury are deliberating on their verdict and what takes place in open court in returning their verdict, holding the statements of jurors admissible as to the latter but not as to the former. *Roberts v. Hughes* (7 M. & W., 399), is like the last case quoted, and affidavits of the jurors were received as to what took place in open court on the delivery of the verdict, to correct it. See, also, *Prussel v. Knowles*, 4 How. [Miss.], 90.

The affidavits were admissible, and they made a clear case for correcting the entry. It would have been unjust to send the parties down to another trial, and as the defendant was not in fault there was no reason for charging him with the costs either of the motion or of the trial.

The order of the General Term must be reversed and that of the Special Term affirmed, with costs of this appeal.

All concur; except FOLGER, J., dissenting.

*Ordered accordingly.*<sup>1</sup>

<sup>1</sup> See *Peters v. Fogarty*, 55 N. J. L. 386, 26 Atl. 855; *Wolfgram v. Schoepke*, 123 Wis. 19, 100 N. W. 1054, 3 Ann. Cas. 398. Compare *Randall v. Peerless*, etc., Co., 212 Mass. 352, 99 N. E. 221. But see *Chevallier v. Dyas*, 28 La. Ann. 359. — ED.

MURDOCK *v.* SUMNER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1839.

[Reported 22 *Pickering*, 156.]

TROVER for divers goods attached by the defendant as sheriff of Suffolk. A verdict had been found for the plaintiff, which the defendant now moved to set aside, upon the affidavits of the jurors, that in assessing the damages they proceeded under a mistake.

SHAW, C. J. This is an application by the defendant, to set aside the verdict and grant a new trial, on the affidavit of the jurors, that in the assessment of damages they made a mistake. The mistake alleged was this, that in estimating the value of the goods which were the subject of controversy, one witness only was examined, who testified as to the quality, condition and cost of the goods, and to his opinion that they were worth the cost; that the jury believed that they were bound by this opinion, whereas if they had felt at liberty to exercise their own judgment, they would have estimated them at a lower rate.

Affidavits of jurors are to be received with great caution. The rule is inflexible, that they will not be received to show misconduct or irregularity on the part of the jury or any of them. And the general rule is, that affidavits of jurors will not be received to prove any mistake of the evidence or misapprehension of the law, on the part of the jury. Different jurors, according to their different degrees of intelligence, of attention and habits of thought, may entertain different views of the evidence, and of the instructions of the court in point of law. But the verdict, in which they all concur, must be the best evidence of their belief, both as to the fact and the law, and therefore must be taken to be conclusive. *Jackson v. Williamson*, 2 T. R. 281; *Owen v. Warburton*, 4 Bos. & Pul. 326; *Ex parte Caykendoll*, 6 Cowen, 53; *Napier v. Daniel*, 3 Bingh. New Cases, 77. The rule is founded upon a consideration of the great danger, practically, of listening to suggestions of misapprehension and mistake in the juries.

The Court are not prepared to say that this is a rule without exception; there may be cases of manifest mistake in computation, or other obvious error, where there are full means of detecting and correcting it, where it would be proper to interfere.

But in the present case, the evidence having been heard *de bene esse*, the Court are of opinion, that the verdict ought not to be set

aside. It was an estimate of the value of goods. The facts were stated by the witness, and also his opinion. But the jurors had full opportunity to exercise their own judgment on the facts, and form their own opinion of the value. If indeed any juror knew any fact bearing upon the subject, such as the state and condition of the particular parcel of goods, especially if it differed from the facts testified, he should have stated it and testified to it in open court, that the court might judge of the competency of the evidence, that the parties might fully examine the witness, and that the counsel and court might have under their consideration the whole of the evidence upon which the verdict is formed. It is not suggested that the jury acted upon such facts. But the jury may properly exercise their own judgment and apply their own knowledge and experience in regard to the general subject of inquiry. In the present case, the jury were not bound by the opinion of the witness; they might have taken the facts testified by him, as to the cost, quality and condition of the goods, and come to a different opinion as to their value.

It is said that the jury understood the court to instruct them, that they must go by the testimony. This, as a general proposition, was true and correct. If there was any danger that the jury would be misled by the generality of this direction, the counsel should have requested the judge to modify it and make it more precise, as applicable to the evidence in the particular case, by informing the jury that they were not bound by the opinions of the witness, but only by such facts as upon the testimony they considered proved, the jury exercising their own judgment upon the credit of the witness, and the weight of the evidence. Besides, if the defendant considered the value of the goods an important point, it was open to him to offer other and more satisfactory evidence upon that point; but he gave no evidence on the subject, relying on that given by the plaintiff.

*Motion dismissed.*<sup>1</sup>

<sup>1</sup> Compare *Minot v. Boston*, 201 Mass. 10, 86 N. E. 783, 25 L. R. A. (N. S.), 311. — Ed.



PETRIE and Another, Executors of KEEBLE *v.* HANNAY,  
Baronet.

KING'S BENCH. 1790.

[Reported 3 *Term Reports*, 659.]

THIS was an action for money paid by the plaintiffs, as executors, and also for money paid by the testator, to the use of the defendant; for money had and received by the defendant to the use of the plaintiffs, as executors; and for money had and received to the use of the testator, in separate counts; to which there were two pleas, the general issue, and the statute of limitations. A verdict having been found for the plaintiffs generally on the first issue, and no notice taken of the last, the defendant brought a writ of error in the House of Lords, on two grounds; that no verdict was given on the second plea; and that the two separate demands could not be joined in one action; there was a joinder in error, and a day was appointed for the argument in the House of Lords. The plaintiffs then obtained a rule to shew cause why they should not be at liberty to amend according to the judge's notes, by adding a verdict for them on the second plea, and by entering the verdict on the counts for money paid by the executors, and for money had and received to their use.

*Erskine* and *Wood* now shewed cause; and said that though perhaps the court would have had no difficulty in permitting the amendment, if the application had been made sooner, they hoped that such an indulgence would not be granted now, as the defendant had brought a writ of error on these objections, and the plaintiffs themselves had joined in error.

*Bearcroft* and *Russell*, in support of the rule, observed that the record still remained in this court, through a transcript of it was sent into the House of Lords, and therefore there was something here by which the amendment could be made; and that in such cases it was almost a matter of course to permit such an amendment on payment of costs.

*BULLER, J.*, said that such amendments had been frequently permitted. The first is merely a slip of the clerk, in not entering up the verdict for the plaintiffs on the second plea. And as to the second, he said, he was clearly of opinion that it was not error; for though an executor, when suing for a debt due to the testator, could not join a debt due to himself in his own right; yet it was

the constant practice to join in the same declaration several counts for money had and received by the defendant to the use of the testator, and to the use of the executor, as such.

Per curiam,

*Rule absolute.*<sup>1</sup>

# COX v. HIGH POINT, RANDLEMAN & SOUTHERN RAILROAD COMPANY.

SUPREME COURT OF NORTH CAROLINA. 1908.

[Reported 149 *North Carolina*, 86.]

CLARK, C. J. Action for damages for wrongful death. In response to the issue as to damages, the jury responded "five thousand." The court entered judgment for "five thousand dollars." This was not error.

Damages are necessarily found in money values. The only words that could be entered after "five thousand" were either "dollars" or "cents," and no one ever says "five thousand cents." The U. S. Compiled Statutes, sec. 3563, provides that the "dollar," not "cent," shall be the unit of value.

Besides, the verdict, like the charge, must be construed with reference to the trial. The complaint was for thirty thousand dollars. The evidence as to damages was expressed in dollars. The Judge charged the jury that the plaintiff's contention was that he was entitled to recover "a certain amount of damages; I mean a certain amount of compensation, *so many dollars* to compensate for the value of his life." The evidence for plaintiff's intestate was that his income was \$1,000 per year. The table of expectancy showed 28 9-10 years. The judge submitted to the jury the proper rule for damages and also left to them the defendant's contention for reductions. The whole controversy before the jury on this issue was in terms of "dollars," not "cents," and the verdict must be construed in that connection.

In *Stevens v. Smith*, 15 N. C., 292, where the plaintiff sued on a note for "four hundred and forty-seven dollars and sixty-six cents," this court held (Gaston, J.) that it was not a variance that by the instrument put in evidence the defendant promised to pay "four hundred and forty-seven and sixty-six cents," saying that the note being for the payment of money, it was payable in our currency, and "dollars" were meant, unless "cents" were named, because

<sup>1</sup> *Clark v. Lamb*, 8 Pick. (Mass.), 415, 19 Am. Dec. 332, *accord*. See *Murphy v. Stewart*, 2 How. (U. S.), 263. — ED.

the Act of Congress, 2 April, 1792 (now U. S. Compiled Statutes, sec. 3563), makes the dollar the unit; that all other coins were recognized as multiples or fractional parts thereof, and that the same was true of our State, Laws 1809, ch. 775, adding, "this note could not be understood by the parties, by a court, or by a jury, in any other sense than as stipulating for the payment of four hundred and forty-seven dollars (or units) and sixty-six cents (or hundredth parts thereof)." This case is cited and approved in *State v. Keeter*, 80 N. C., 474.

"The omission of the word 'dollars' in a verdict for a money recovery does not affect the validity of the judgment, when it is manifest that dollars were meant, though it would be more regular to amend the verdict before judgment." *Hopkins v. Orr*, 110 U. S., 513; *Parks v. Turner*, 12 How., 39; *Beall v. Territory*, 1 N. M., 519; *R. R. v. Fink*, 4 Tex. Civ. App., 269. "From the earliest period the courts have freely exercised the power of amending verdicts so as to correct manifest errors, both of form and of substance, to make them conform to the intention of the jury." 2 Thompson Trials, sec. 2642, and cases cited.

Of course, if the verdict had been returned in open court, the Judge should and doubtless would have called the omission of the word "dollars" to the attention of the jury. *State v. Godwin*, 138 N. C., 585. But we learn that, by consent, the verdict was rendered to the Clerk. If the matter had been called to the attention of the Judge, on the reassembling of the Court, he would have called the jury together. *Petty v. Rousseau*, 94 N. C., 362, and cases there cited. But they may have dispersed. At any rate the matter does not appear to have been called to the attention of the Judge by exception in apt time, nor indeed at all. The case is presented here simply by the appeal and assignment of error, both of which could have been entered at any time within ten days after court had adjourned.

In view of the pleadings, the evidence, the nature of the case, the contentions of the parties as arrayed by the Judge in his charge, his instructions to the jury and the absence of any exception in apt time, it would be "sticking in the bark," indeed, to hold that the verdict was not meant to be expressed in dollars.

*Affirmed.*<sup>1</sup>

<sup>1</sup> See a note to the principal case in 35 L. R. A. (N. S.), 653. Compare *Bacon v. Schepflin*, 185 Ill. 122, 56 N. E. 1123; *Thames Loan & Trust Co. v. Beville*, 100 Ind. 309; *Miller v. Morgan*, 143 Mass. 25, 8 N. E. 644; *Hurst v. Webster Mfg. Co.*, 128 Wis. 342, 107 N. W. 666. — Ed.

## BUTCHER, Executor of BUTCHER, v. METTS.

DISTRICT COURT FOR THE CITY AND COUNTY OF  
PHILADELPHIA. 1836.[Reported 1 *Miles*, 153.]

THE facts of the case were these.

The only count in the declaration was *indebitatus assumpsit* for money had and received by the defendant for the plaintiff's use.

The evidence received on the trial was, that Job Butcher, the plaintiff's testator, by indenture dated in August, 1787, conveyed a lot of ground to Adam Metts in fee, reserving thereout a rent charge of 12 dollars 48 cents, payable annually by Adam Metts, his heirs and assigns, forever. In 1797 Adam Metts died intestate, leaving a widow, Barbara Metts, and several children, one of whom was George Metts, the defendant. Barbara Metts, with some, if not all her children, continued to reside in a house erected on this lot after her husband's decease, and until the year 1827, when by virtue of proceedings agreeably to the act of assembly made for such purposes, a public street, called Juliana street, was extended from Buttonwood street to Green street; and this lot lying in its direct course, a large portion of the ground, including all the buildings erected upon the whole lot at that time, was taken for that street. Damages appear to have been claimed by Barbara Metts for the ground thus appropriated to public use, and the jury appointed by the quarter sessions awarded to her 1400 dollars, without designating in whose right they were given, or whether to her own use, or the use of her children or of other persons. This money was paid under an order of the quarter sessions, in favour of Barbara Metts, to the defendant, who gave a receipt signed "George Metts, for Barbara Metts." Barbara Metts died some time afterwards, and the defendant administered on her estate, and on the 11th of November 1831 filed his account in the register's office, in which he charged himself with 1191 dollars as damages awarded for opening Juliana street, leaving 209 dollars unaccounted for. This latter amount, being about the value of the rent charge reserved to his testator, the plaintiff alleged, had been received by the defendant from the county treasurer's office for his use, and some evidence was given of admissions by the defendant that he so considered it. It appeared also that the portion of the lot *not* taken for Juliana street consisted of two pieces, each of a triangular shape.



The jury rendered a verdict in the following words: "The jury agree upon a verdict in favour of the plaintiff for 308 dollars 50 cents, conditioned that a release in fee be conveyed on the remaining property, to George Metts (consisting of two triangles) for the estate of Adam Metts." Within the four days allowed by the rule of court for motions for new trial, and in arrest of judgment, the plaintiff filed in court a release by the plaintiff and wife, of the part of the lot supposed to have been in the contemplation of the jury.

The defendant moved in arrest of judgment, and assigned two reasons: "1. Because the verdict is illegal. 2. Because it is void for uncertainty."

STROUD, J. In England, and such of our sister states as have followed her example in the establishment of a court of equity distinct from a court of common law, the only question upon this verdict would be, whether the part of the finding of the jury beyond the mere assessment of damages, could be rejected as surplusage. It is manifest, however, that the verdict will not admit of this construction. The finding is not of two distinct parts. They are made to depend on each other. The first part is not found except upon the condition which is expressed in what follows. To preserve the intention of the jury, the whole must be retained. *Witman v. Ely*, 4 Serg. & Rawle, 264.

Regarded then as a conditional verdict, can judgment be rendered upon it in our courts, where, from the want of a court of chancery, we are compelled to administer, as well as we may, a system of jurisprudence which combines the rules of law and equity together. It is readily conceded that, with us, actions may be grounded upon rights merely equitable, as in *Lang v. Keppele*, 1 Binn. 579; and we admit defences of a similar character. *Pollard v. Schaeffer*, 1 Dall. 211; *Jordan v. Cooper*, 3 Serg. & Rawle 578. The specific execution of contracts may be enforced, also, through the medium of a conditional verdict in the action of ejectment; and where articles of agreement exist in covenant or debt. Cases abound in support of this doctrine.

But not to pursue the general subject beyond the exigences of the case under consideration, it may be stated, as a general principle, that where the form of action is *ex contractu*, and the plaintiff founds himself upon a right merely equitable, his declaration should be assimilated to a bill in equity, and should set forth distinctly the special circumstances upon which the equity he claims is supposed to arise. *Jordan v. Cooper*, 3 Serg. & Rawle 578, 579, 581; *Wit-*

man v. Ely, 4 Serg. & Rawle 266, 267; Reichart v. Beidleman, 17 Serg. & Rawle 43.

The plaintiff here has not adopted this course. His declaration is not special. It does not profess to be founded upon an express contract; it is simply *indebitatus assumpsit* on a common money count. The ground upon which he mainly relied on the trial, was, that the money claimed by him had been received by the defendant as his agent, or on his behalf, impliedly, under the decree of the court of quarter sessions. As the motion before us is not for a new trial, but merely in arrest of judgment, it is unnecessary to express any opinion upon the character and strength of this pretension. We are confined to the examination whether the verdict which has been given, viewed in reference to the declaration, will warrant a judgment. And we are decidedly of opinion it will not. The finding of the jury should have been absolute. The issue joined between the parties forbids any other. Were it even conceded that the evidence received on the trial would justify the conditional verdict which has been found, in what manner would the supreme court become possessed of this; and how, otherwise, could revision take place?

If the plaintiff supposes the special circumstances which were disclosed on the trial are such as to constitute an equitable right in him, sufficient to sustain an action, let him adapt his declaration to the suggestions which have been made. A demurrer will then present the true question fairly before the court, and save the necessity of a jury trial altogether. A course similar to this is stated to be correct where the defence is purely equitable; Robinson v. Eldridge, 10 Serg. & Rawle 142; and the principle applies with equal fitness to declarations on such rights.

*Judgment arrested.*

## COLLINS v. WHITESIDE.

COURT OF ERRORS AND APPEALS OF NEW JERSEY.

1908.

[Reported 75 *New Jersey Law*, 865.]

TRENCHARD, J. This is an action upon contract brought in the Hudson County Circuit Court.

Reduced to narrative form the essential allegations of the declaration are that in 1893 the defendant, Whiteside, was the owner of a race horse and made an agreement with the plaintiff, Collins,

that the plaintiff should enter the horse in races in which he was eligible to be run at certain specified race tracks during the racing season of 1893, and should pay for the benefit of the defendant all entrance fees and forfeits charged by the racing associations for such entering, the defendant agreeing to repay the plaintiff; that the plaintiff accordingly paid certain moneys and the defendant did not repay the same.

The defendant pleaded — *first*, the general issue; *secondly*, that “the alleged agreement sued on was in contravention of and in violation of the statute”; *thirdly*, the statute of limitations.

At the trial certain questions in writing were submitted by the judge to the jury and were answered favorably to the contention of the plaintiff as to the matters of fact which they concerned.

So far as the *postea* discloses, no general verdict was rendered for either party.

The main object of special questions submitted by a trial judge to a jury has been variously stated as being to bring out the various facts separately in order to enable the court to apply the law correctly, and to guard against any misapplication of the law by the jury; to obtain an explanation of the general verdict; to test the correctness of the general verdict; to correct wrong inferences from the facts which the jury finds to exist; to confine juries within their proper sphere, and to enable a party more effectually to secure a review of findings of fact. See 20 Encycl. Pl. & Pr. 299, and cases there collected.

A special finding of facts in response to interrogatories is essentially different from a special verdict, though it partakes somewhat of the same nature. A special finding is a response to a single inquiry directed to a particular fact necessary to the finding of a general verdict, while a special verdict is a finding of all the facts proved or admitted at the trial. The office of a special finding is that if, under the law, the particular facts are inconsistent with the general verdict, the former shall control the latter. Accordingly, special findings must always be coupled with a general verdict. See 20 Encycl. Pl. & Pr. 300, and cases there cited.

Obviously, there being no general verdict, the present case could not be treated as one of special finding.

The learned trial judge treated it as a special verdict and ordered judgment for the defendant on the theory that the contract was one prohibited by section 1 of the act to prevent gaming. Gen. Stat. p. 1606.

The plaintiff's writ of error brings up for review the propriety of that judgment.

Upon an inspection of the circuit record, it may well be doubted whether the verdict in question is in the form of a special verdict. But since both parties have, without question, so considered it, it will be so treated. *Behring v. Somerville*, 34 Vroom, 568.

Considered as such, it furnishes no support for the judgment.

In determining what judgment may be properly entered upon a special verdict, nothing can be looked at by the court except the pleadings and the *postea*. *Seabright v. Central Railroad Co.*, 43 Vroom, 8; 2 Arch. Pr. 215; 2 Tidd, 598.

It has been held in this court that in dealing with a special verdict, the court draws conclusions of law from facts found, but does not draw conclusions of fact from evidence. The material facts relied on must be expressly found. *Behring v. Somerville*, *supra*. See, also, *Bouvier v. Baltimore and New York Railroad Co.*, 36 Vroom, 313.

An examination of the pleadings and circuit record discloses that the only material facts found by the jury were — *first*, that “the defendant authorized the plaintiff to enter the horse ‘Elberon’ in any scheduled races in which the horse was eligible and in which the plaintiff thought the horse had a chance to win a stake”; *second*, that “the defendant authorized the plaintiff to advance entry fees or forfeit fees for the account of the defendant,” and *third*, that “such fees were paid by the plaintiff.”

Section 1 of the act to prevent gaming (Gen. Stat., p. 1606), which, in the view of the trial judge, required a judgment for the defendant, provides “that all wagers, bets or stakes made to depend upon any race or game, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event, shall be unlawful.”

But it will be noticed that the special verdict does not show either of the material facts that a wager or bet was made upon a race, or that the horse ran for a stake depending on the event of the race. The fact that the plaintiff was authorized “to enter the horse in any scheduled races in which the plaintiff thought he had a chance to win a stake” does not show that the stake depended on the event of the race or even that there was a stake to be won. The fact that the moneys paid by the plaintiff were “entry fees or forfeit fees” is not alone sufficient to bring him within the condemnation of section 55 of the Crimes act then in force (Gen. Stat., p. 1060), for by the proviso of that section it does not apply to fairs



or exhibitions of any agricultural or other incorporated society, nor of section 224 of the same act (Gen. Stat., p. 1090), because that section relates only to contributions to make up a purse. It will be observed that the material facts that the entry or forfeit fees went to make up the stake, and that the races were not at a fair or exhibition of an agricultural or other incorporated society, do not appear in the special verdict.

Doubtless closer analysis would disclose that other essentials of the defendant's case are wanting in the facts found. But it is sufficient to say that some of the material facts are not found.

The defendant is not entitled to judgment on the special verdict, nor should judgment be given for the plaintiff. In such cases the proper practice is to award a *venire de novo*. *Bouvier v. Baltimore and New York Railroad Co.*, *supra*.

Accordingly, the judgment below must be reversed and a *venire de novo* awarded. *For affirmance — None.*

### HODGES *v.* EASTON.

SUPREME COURT OF THE UNITED STATES. 1882.

[Reported 106 *United States*, 408.]

HARLAN, J. This was a suit by Easton and Bigelow against Hodges and Smith to recover damages for the alleged conversion of certain wheat, stored, in separate bins, in the warehouse of William H. Valleau, in Decorah, Iowa.

The complaint contains two counts. The first proceeds upon the ground that the wheat, when so converted, was the property of the plaintiffs. The second avers that, during the winter and spring of 1876, the First National Bank of Decorah, Iowa, discounted notes and drafts for, and loaned money to, said Valleau, upon the security of a large quantity of wheat delivered to the bank, of which he, Valleau, was then the owner and had the possession, and which was stored, in separate bins, in a warehouse in Decorah, Iowa; that thereby the wheat became the property of the bank; that subsequently, in April and May, 1876, Valleau, without repaying such loans and discounts, and without the knowledge and consent of the bank, wrongfully and tortiously took and removed the wheat from the warehouse and from the possession of the bank, shipped it to the defendants, at Milwaukee, by whom it was wrongfully and tortiously received and sold, and the proceeds

converted to their own use; that no part of the moneys, so loaned and advanced, has ever been paid by Valteau, or by any one for him; that, prior to this suit, the bank sold, assigned, and transferred its right, title, and interest in the wheat, and all right of action to recover the same or its value, of which assignment the defendants had notice before this action; and lastly, that, prior to the commencement of the action, the bank and the plaintiffs had each demanded from the defendants the delivery of the wheat, but they had refused to deliver it, or any part thereof, either to the bank or to plaintiffs.

The answer denies, generally, "each and every allegation, statement, matter, fact, and thing in the complaint, set forth, alleged, and contained."

The record states that the jury, impanelled and sworn to try the issues, "rendered a special verdict in answer to the questions propounded by the court." The questions so propounded, with the answers thereto, were made the special verdict. The jury having been discharged, the plaintiffs, by counsel, moved for judgment upon the special verdict for the value of the wheat wrongfully converted by defendants, or for such damages as the court should adjudge, and for such other and further relief as might be granted in the premises. On a later day the defendants moved to set aside the special verdict and grant a new trial, upon the ground, among others, that the special verdict "does not contain findings upon the material issues in the case."

These motions were heard together, and it was ordered by the court "that the motion of defendants for a new trial be, and is hereby, overruled, and that the motion of the plaintiffs for judgment upon the special verdict of the jury, and *facts conceded or not disputed upon the trial*, be, and is hereby, granted." The damages were assessed by the court at \$12,554.89, for which sum judgment was entered against the defendants. From that judgment this writ of error is prosecuted.

Under the Code of Practice of Wisconsin the answer in this case puts in issue every material allegation in the complaint. 2 Taylor's Stat. Wis., 1871, p. 1439. And since, by sect. 914 of the Revised Statutes, the practice, pleading, forms, and modes of proceeding, in civil causes, other than equity and admiralty causes, in the Circuit and District Courts of the United States, must conform, as near as may be, to the practice, pleadings, forms, and modes of proceeding existing at the time in like causes in the courts of record in the State within which such Circuit or District

Courts are held, it was, as conceded in argument here, incumbent upon the plaintiff to prove at the trial, among other things, that the bank had sold, assigned, and transferred all title and interest in the wheat, and thereby, also, a right to recover it or its value. No bill of exceptions was taken showing the evidence introduced by either party, nor was there a general verdict. Having regard alone to the questions and answers propounded to the jury, it is clear that the plaintiffs did not prove their case, as made by the first count, which proceeded upon the ground that the wheat was their property. It is equally clear that there was no finding upon the issue, raised by the second count, as to the alleged assignment by the bank to them. No question was propounded upon that subject, nor was that point covered by the written stipulation as to the amount of freight and the value of the wheat. We infer from the oral statement of counsel for the plaintiffs, that, at the trial below, the assignment by the bank was conceded, and that the final judgment was based, in part, upon that concession. But in that representation, counsel who appeared in this court for the defendants — but who did not participate in the trial — did not feel authorized to concur. Looking, therefore, as we must, to the case as disclosed by the record, we are constrained to hold that the answers to the special questions propounded by the court, being silent as to the assignment by the bank, did not furnish a basis for judgment in favor of the plaintiffs. Without proof upon that point, they were not entitled to judgment upon the second count. In *Patterson v. United States*, 2 Wheat. 221, it was said, that if it appeared to the court of original jurisdiction, or to the appellate court, that the verdict was confined to a part only of the matter in issue, no judgment could be rendered upon it. In *Barnes v. Williams*, 11 Wheat. 415, the claim of the plaintiff being founded upon a bequest of certain slaves, it was essential to a recovery, at law, that the assent of the executor to the legacy should be proved. This court, speaking by Mr. Chief Justice Marshall, said: "Although in the opinion of the court there was sufficient evidence in the special verdict from which the jury might have found the fact, yet they have not found it, and the court could not, upon a special verdict, intend it. The special verdict was defective in stating the evidence of the fact, instead of the fact itself. It was impossible, therefore, that a judgment could be pronounced for the plaintiff."

But it is suggested that the final judgment, upon its face, shows that it was not based exclusively on answers to the special ques-



tions, and the stipulation by the parties as to the amount of freight and value of wheat; but also "upon facts conceded or not disputed upon the trial." Although this court is not informed by the record as to what those conceded and undisputed facts are, it is insisted that we should presume, in support of the judgment, that they were, in connection with the facts specially found, sufficient to justify the action of the court below. This position, it is contended, is sustained by numerous decisions of the Supreme Court of Wisconsin, upon the subject of general and special verdicts, as defined and regulated by the laws of that State in force when this action was tried.

It is not necessary, in this opinion, to enter upon an examination of those decisions, or to consider how far the local law controls in determining either the essential requisites of a special verdict in the courts of the United States, or the conditions under which a judgment will be presumed to have been supported by facts other than those set out in a special verdict. The difficulty we have arises from other considerations. The record discloses that the jury determined a part of the facts, while other facts, upon which the final judgment was rested, were found by the court to have been conceded or not disputed. If we should presume that there were no material facts considered by the court beyond those found in the answers to special questions, then, as we have seen, the facts found do not authorize the judgment. If, on the other hand, we should adjudge it to have been defendants' duty to preserve the evidence in a bill of exceptions, and that, in deference to the decisions of the State court, it should be presumed that the "facts conceded or not disputed at the trial" were, in connection with the facts ascertained by the jury, ample to support the judgment, we then have a case at law, which the jury were sworn to try, determined, as to certain material facts, by the court alone, without a waiver of jury trial as to such facts. It was the province of the jury to pass upon the issues of fact, and the right of the defendants to have this done was secured by the Constitution of the United States. They might have waived that right, but it could not be taken away by the court. Upon the trial, if all the facts essential to a recovery were undisputed, or if they so conclusively established the cause of action as to have authorized the withdrawal of the case altogether from the jury, by a peremptory instruction to find for plaintiffs, it would still have been necessary that the jury make its verdict, albeit in conformity with the order of the court. The court could not, consistently with the constitutional right of trial by jury, submit



a part of the facts to the jury, and, itself, determine the remainder without a waiver by the defendants of a verdict by the jury. In civil cases, other than those in equity and admiralty, and except where it is otherwise provided in bankruptcy proceedings, "the trial of issues of fact" — that is, of all the material issues of fact — "in the Circuit Courts shall be by jury," unless the parties, or their attorneys of record, stipulate in writing for the waiver of a jury. Rev. Stat., sects. 648, 649. There is no such stipulation in this case, and there is nothing in the record from which such stipulation or waiver may be inferred. It has been often said by this court that the trial by jury is a fundamental guarantee of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver. For these reasons the judgment below must be reversed.

One other point discussed by counsel for defendants in error must be noticed. He insisted that the order of reversal, if one be made, should be accompanied by a direction to the court below to restrict the next trial to such issues as are not covered by the answers of the jury to special questions. In support of this position, we have been referred to several adjudications which seem to recognize the authority of the court, when setting aside a judgment, to restrict the subsequent trial to such issues as were not passed upon by the jury at the first trial. Whether this contention be sound or not, we need not now determine, for the reason that the grounds upon which it rests have no existence, where, as here, the case, as to the issues triable by jury, was not submitted to the jury in the mode required by law. There is, then, no alternative but to reverse the judgment, with directions that a trial be had upon all the material issues of fact; and it is *So ordered*.<sup>1</sup>

## RICHARDSON v. WEARE.

SUPREME COURT OF NEW HAMPSHIRE. 1882.

[Reported 62 *New Hampshire*, 80.]

CASE, for damages from a defective highway, tried on the general issue. After the jury had received general instructions, which included the instruction that if the injury was in any degree the result of the plaintiff's want of ordinary care, the verdict must

<sup>1</sup> See *Wallingford v. Dunlap*, 14 Pa. 31. But see *Stringham v. Cook*, 75 Wis. 589, 44 N. W. 777. The principal case is discussed in *Slocum v. New Life Ins. Co.*, 228 U. S. 364, 384, 424, 57 L. ed. 879, 33 S. Ct. 523. — ED.

be for the defendants, by request of the defendants' counsel the jury were directed to answer this question: Did the injury to the plaintiff occur in consequence of any neglect or fault on his part? A general verdict was returned for the plaintiff, and the special question was answered in the affirmative. The court ordered judgment for the defendants, and the plaintiff excepted.

ALLEN, J. It was decided, in *Walker v. Sawyer*, 13 N. H. 191, 196, 197, that, in a case tried on the general issue, the court would not submit a particular question of fact to be found and returned by their verdict, without the consent of the parties. But when it is proposed to submit specific questions to the jury, it will be taken for granted that the parties assent, unless they object at the time, and before the jury retires. *Willard v. Stevens*, 24 N. H. 271, 277; *Allen v. Aldrich*, 29 N. H. 63. And later, in *Barstow v. Sprague*, 40 N. H. 27, 33, it has been decided that the court, against the objection of either or both parties, may properly direct a jury to return, with a general verdict, answers to specific questions submitted to them. No objection having been taken, at the time, to the submission of the special question to the jury in this case, the plaintiff must be understood to have consented, and the objection after verdict comes too late.

The special finding of fact was conclusive (*Walker v. Sawyer*, *supra*, 196, 197, *Willard v. Stevens*, *supra*, 277), and, being a material fact upon which the general result depends, it must control the general verdict. The court having given specific and correct instructions to the jury upon the subject, and that their general verdict must be for the defendants, if they should answer the question in the affirmative, the plaintiff could not have been prejudiced nor the jury embarrassed by the question. *Johnson v. Haverhill*, 35 N. H. 74, 87. Upon the answer to the special question, the defendants were entitled to a general verdict and judgment.

*Exceptions overruled.*

STANLEY, J., did not sit: the others concurred.

[Stephen, *Pleading* (Williston's edition), \*99-\*102.]

A more common, because more convenient, course than this [demurring to the evidence], to determine the legal effect of the evidence, is, to obtain from the jury a *special verdict*, in lieu of that *general* one, of which the form has been already described. For the jury have an option, instead of finding the *negative or affirmative of the issue*, as in a general verdict, to find *all the facts of the case as disclosed upon the evidence before them*, and, after so setting them

forth, to conclude to the following effect: "that they are ignorant, in point of law, on which side they ought, upon these facts, to find the issue; that if, upon the whole matter, the court shall be of opinion that the issue is proved for the plaintiff, they find for the plaintiff accordingly, and assess the damage at such a sum, &c.; but if the court are of an opposite opinion, then *vice versâ*." This form of finding is called a *special verdict*. However, as on a general verdict, the jury do not themselves actually frame the *postea*, so they have, in fact, nothing to do with the formal preparation of the special verdict. When it is agreed that a verdict of that kind is to be given, the jury merely declare their opinion as to any fact remaining in doubt; and then the verdict is adjusted without their further interference. It is settled, under the correction of the judge, by the counsel and attornies on either side, according to the state of facts as found by the jury, with respect to all particulars on which they have delivered an opinion; and with respect to other particulars, according to the state of facts which it is agreed that they *ought* to find upon the evidence before them. The special verdict, when its form is thus settled, is, together with the whole proceedings on the trial, then entered *on record*; and the question of law arising on the facts found, is argued before the court in bank, and decided by that court, as in case of demurrer. If the party be dissatisfied with their decision, he may afterwards resort to a court of error.

It is to be observed, that it is a matter entirely in the *option of the jury*, whether their verdict shall be general or special. The party objecting in point of law, cannot therefore *insist* on having a special verdict, and may consequently be driven to *demur to the evidence* — at least if he wishes to put the objection *on record*, without which no writ of error can be brought, nor the decision of a *court of error* obtained. But if the object be merely to obtain the decision of the court in bank, and it is not wished to put the legal question *on record*, in a view to a *writ of error*, then the more common (because the cheaper and shorter course) is neither to take a *special verdict*, nor *demur to the evidence*, but to take a *general verdict, subject* (as the phrase is) *to a special case*; that is, to a written statement of all the facts of the case, drawn up for the opinion of the court in bank, by the counsel and attornies on either side, under correction of the judge at *nisi prius*, according to the principle of a special verdict, as above explained. The party for whom the general verdict is so given, is of course not entitled to judgment, till the court in bank has decided on the special case; and, according to the result of



that decision, the verdict is ultimately entered either for him or his adversary. A special case is not (like a special verdict) entered *on record*; and consequently a writ of error cannot be brought on this decision.<sup>1</sup>

[Thayer, *Preliminary Treatise on Evidence at the Common Law*, pp. 217-219.]

THE judges often compelled special verdicts. It was the old law that a jury, if it chose to run the risk of a mistake, and so of the punishment by attain, always might find a general verdict. But the judges exerted pressure to secure special verdicts; sometimes they ordered them, and enforced the instruction by threats, by punishing the jury, and by giving a new trial. As a matter of history, we know that the jury, on the whole, successfully stood out against these attempts; and that in most cases their right was acknowledged. But now it is remarkable how judges and legislatures in this country are unconsciously travelling back towards the old result of controlling the jury, by requiring special verdicts and answers to specific questions. Logic and neatness of legal theory have always called loud, at least in recent centuries, for special verdicts, so that the true significance of ascertained facts might be ascertained and declared by the one tribunal fitted to do this finally and with authority. But considerations of policy have called louder for leaving to the jury a freer hand. The working out of the jury system has never been shaped merely by legal or theoretical considerations. That body always represented the people, and came to stand as the guardian of their liberties; so that whether the court or the jury should decide a point could not be settled on merely legal grounds; it was a question deeply tinged with political considerations. While it would always have been desirable, from a legal point of view, to require from the jury special verdicts and answers to special questions, that course would have given more power to the king and less to the people. It is one of the eccentricities of legal history that we, in this country, while exalting in some ways the relative function of the jury far beyond all English precedent, are yet, in some parts of the country, greatly cutting down their powers in the particular here referred to. Doubtless the judges at common law have always exercised a limited power of questioning the jury about their verdicts. But the general, common-law right of the jury to refuse to answer such questions and to give a short, general verdict has been acknowledged.

<sup>1</sup> See *Trafflet v. Empire Life Ins. Co.*, 64 N. J. L. 387, 46 Atl. 204. — Ed.



[Form of General Verdict for Plaintiff.]<sup>1</sup>

In the..... Court of the County of....., State of.....

|                   |            |
|-------------------|------------|
| A. B., plaintiff, | } Verdict. |
| against           |            |
| C. D., defendant. |            |

We, the jury in the above entitled cause, find for the plaintiff in the sum of.....dollars and.....cents.

X. Y., Foreman.

[Form of Special Verdict.]<sup>2</sup>

(Title of cause.)

We, the jury in the above entitled cause, do find the facts in the said cause to be as follows: (*The facts found are stated as in a pleading*).

If upon these facts the law is with the plaintiff, then we find for the plaintiff, and assess his damages at.....dollars and.....cents. And if the law is with the defendant, then we find for the defendant.

X. Y., Foreman.

<sup>1</sup> For the old English form of *postea*, see Tidd, Forms, 8th ed., 315. — Ed.

<sup>2</sup> See, for the old English form of *postea* on special verdict, Tidd, Forms, 8th ed., 325. — Ed.

## CHAPTER VIII.

### MOTION FOR NEW TRIAL.

#### GIBNEY *v.* ST. LOUIS TRANSIT COMPANY.

SUPREME COURT OF MISSOURI. 1907.

[Reported 204 *Missouri*, 704.]

BURGESS, J.<sup>1</sup> This is an action for damages for personal injuries alleged to have been sustained by plaintiff on the 13th day of June, 1902, by being thrown from defendant's car, by reason of its premature start, whilst plaintiff was in the act of alighting therefrom at the corner of Taylor and Washington avenues in the city of St. Louis. The action was instituted in the circuit court of the city of St. Louis, and afterwards, on the 18th day of April, 1903, on application of plaintiff for a change of venue, the cause was transferred to the circuit court of Montgomery county, where plaintiff, upon trial had, recovered a verdict and judgment for the sum of thirty thousand dollars. Defendant filed motion for new trial, and afterwards, and within four days after the rendition of the verdict, filed a supplemental motion for a new trial, also motion in arrest of judgment, which motions were by the court overruled, and defendant appealed. . . .

One of the grounds for new trial assigned by defendant in its motion is that one of the jurors trying the cause was prejudiced and biased. The juror, Samuel A. Moore, upon his *voir dire* examination testified in effect that he had no business relations with or interest in the St. Louis Transit Company, and that he had no bias or prejudice against the parties, or either of them. Upon these statements he was accepted by both sides as a competent and qualified juror. After the case had been submitted to the jury it was learned that Moore was one of a large number of employees of the defendant company who went on a strike in the city of St. Louis in May, 1900, the strike continuing for several months, during which time feeling between the strikers and their employers ran high; defendant's tracks were demolished by dynamite, and crimes, some amounting to felonies, were committed by

<sup>1</sup> Only a part of the opinion is given. — Ed.

the strikers. As soon as defendant's counsel learned that Moore took part in said strike, the court was informed thereof. When the motion for new trial was heard, Moore was offered as a witness for plaintiff. He did not deny any of the charges made against him, his examination and evidence being confined solely to the questions asked on the *voir dire*. . . .

That the juror was prejudiced against the defendant, and was not for that reason a competent juror, was shown by the affidavits filed in the court below, and this fact was further emphasized by the exceedingly large and unjustifiable verdict rendered by the jury. That the defendant would not have permitted Moore to serve on the jury, without objection, had its counsel been in possession of the facts disclosed by the affidavits, no one will doubt, and when the attention of the court was called to these facts it should have rectified the mistake by granting a new trial. . . .

The judgment is reversed and the cause remanded.<sup>1</sup>

All concur.

### WOODWARD v. DEAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1873.

[Reported 113 *Massachusetts*, 297.]

TORT. After verdict for the plaintiff, in the Superior Court, the defendant moved before Pitman, J., to set the verdict aside on account of the disqualification of a juror. At the hearing upon the motion it appeared that Henry B. Macomber, one of the jurors, was the husband of the plaintiff's niece. The court found as a matter of fact, that the juror had no previous knowledge of the case, and had no bias or prejudice, unless such bias or prejudice must necessarily be inferred from the relationship; and that the defendant, although he knew that Macomber was the plaintiff's nephew by marriage, did not know till after the trial, being personally unacquainted with him, that he was on the panel. The court found that there was no negligence on the defendant's part, but ruled as a matter of law that the mere fact of the relationship was not a sufficient ground for setting aside the verdict, and refused to grant the motion; and the defendant alleged exceptions.

GRAY, C. J. It is provided by statute that the court shall, on motion of either party in a suit, examine on oath any person who

<sup>1</sup> *Knights of Pythias v. Steele*, 107 Tenn. 1, 63 S. W. 1126, *accord*. — Ed.

is called as a juror therein, to know whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; that the party objecting to the juror may introduce any other competent evidence in support of the objection; and that if it appears to the court that the juror does not stand indifferent in the cause, another shall be called and placed in his stead for the trial of the cause. Gen. Sts. c. 132, § 29.

The evident object of this enactment is that the question whether the jurors summoned can impartially try the case shall be ascertained and determined before the trial proceeds. A party against whom a verdict has been rendered, who has not seasonably availed himself of the means of inquiry thus afforded him, may indeed, upon proof to the satisfaction of the court that a juror did not stand indifferent, by reason of facts unknown to the party until after the verdict, be granted a new trial or review at the discretion of the court; but he is not entitled to it as matter of law, and has no right of exception if it is refused. *Jeffries v. Randall*, 14 Mass. 205. *Davis v. Allen*, 11 Pick. 466. *Kinnicutt v. Stockwell*, 8 Cush. 73. *Eggleston v. Smiley*, 17 Johns. 133. *In re Chelsea Waterworks Co.*, 10 Exch. 731. *Exceptions overruled.*<sup>1</sup>

## STAMPOFSKI v. STEFFENS.

SUPREME COURT OF ILLINOIS. 1875.

[Reported 79 *Illinois*, 303.]

CRAIG, J. This was an action of assumpsit, brought by appellee against appellant, to recover for labor performed in the manufacture of certain furniture.

<sup>1</sup> See *Kohl v. Lehlbach*, 160 U. S. 293, 40 L. ed. 432, 16 S. Ct. 304 (juror an alien); *Quinebaug Bank v. Leavens*, 20 Conn. 87 (juror related to stockholder of plaintiff); *State v. Brockhaus*, 72 Conn. 109, 43 Atl. 850 (juror under required age); *State v. Pickett*, 103 Ia. 714, 73 N. W. 346, 39 L. R. A. 302 (juror unable to read or write English); *Dickerson v. North Jersey St. Ry. Co.*, 68 N. J. L. 45, 52 Atl. 214 (juror unable to understand English); *Watts v. Ruth*, 30 Oh. St. 32 (juror an infant); *State v. Harris*, 69 W. Va. 244, 71 S. E. 609, 50 L. R. A. (N. S.), 933 (juror related to prosecuting witness). But see *Jewell v. Jewell*, 84 Me. 304, 24 Atl. 858, 18 L. R. A. 473.

If either the party or his counsel was aware of the disqualification and did not challenge, there is no ground for granting a new trial. *State v. Bussamus*, 108 Ia. 11, 78 N. W. 700.

As to the right to a new trial for allowing or refusing to allow a challenge, see Chapter VII, Section II, *supra*. — ED.



A trial of the cause before a jury resulted in a verdict and judgment in appellee's favor for \$153.08, which the appellant seeks to reverse upon two grounds: first, that the verdict is against the evidence;<sup>1</sup> second, improper conduct on the part of one of the jurors during the progress of the trial of the cause. . . .

It is, however, claimed that the judgment should be reversed for the reason that, while the trial was in progress, one of the jurors, without permission, visited the place where the furniture was stored and made an examination of it for himself.

It is not claimed that this act of the juror was done with the knowledge or consent of appellee or his attorney; on the contrary, the affidavits filed clearly show such was not the case.

The juror had no right, without the consent of the parties, to examine the furniture. On the trial of a cause the jury must rely upon the evidence introduced in court; they cannot go outside for the purpose of getting facts upon which to base a verdict.

But it appears that appellant was informed of the irregular conduct of the juror while the cause was on trial, and before it was finally submitted to the jury. Under such circumstances it was the duty of appellant to notify the court of the conduct of the juror, and interpose an objection to the trial proceeding before a juror who had been guilty of conduct which was likely to interfere with a fair and impartial administration of justice.

This, however, he failed to do, but remained silent, and speculated upon the chances of a successful verdict in his favor, predicated upon the superior information the jury had obtained in an unlawful manner. By remaining silent, when it was his duty to speak, he has waived the right now to object.

It was held in the case of *Van Blaricum v. The People*, 16 Ill. 364, that a party had a right to have a cause tried by a partial jury, if he saw proper. So here, after appellant received notice of the conduct of the juror, if he saw proper to have him pass upon his case it was his right to do so.

At all events, his silence, after he became aware of the improper conduct of the juror, must be regarded as a waiver of the irregularity.

As the record discloses no substantial error, the judgment will be affirmed.

*Judgment affirmed.*<sup>2</sup>

<sup>1</sup> A part of the opinion in which it was held that the verdict was not against the evidence is omitted. — Ed.

<sup>2</sup> *Zibbell v. Southern Pac. Co.*, 160 Cal. 237, 116 Pac. 513, *accord*. — Ed.

QUAGLIANA v. JERSEY CITY, HOBOKEN AND  
PATTERSON STREET RAILWAY COMPANY.

SUPREME COURT OF NEW JERSEY. 1908.

[Reported 77 *New Jersey Law*, 101.]

TRENCHARD, J. This action was brought by the plaintiff to recover compensation for injuries to his foot alleged to have been caused by reason of his being thrown from and run over by a trolley car of the defendant company as he was attempting to board the car.

The trial at the Essex Circuit resulted in a verdict for the defendant.

The plaintiff was allowed this rule to show cause why the verdict should not be set aside.

The first contention of the plaintiff is that the verdict was contrary to the weight of the evidence.

There is no merit in this contention.<sup>1</sup> . . .

The next contention of the plaintiff is that one Bagley, a material witness for the plaintiff, was influenced by the defendant to absent himself from the trial and that his absence justifies this court in granting a new trial.

Misconduct of the prevailing party or his attorney, in inducing a witness to absent himself from the trial, is ground for a new trial. *Carey v. King*, 5 Ga. 75; *Barron v. Jackson*, 40 N. H. 365; *Crafts v. Union Mutual Fire Insurance Co.*, 36 Id. 44.

But the misconduct must be clearly established. *Marsh v. Monekton*, 1 Tyrw. & G. 34.

The affidavits in this case, taken in pursuance of the rule, do not disclose misconduct upon the part of the defendant or its attorney. It appears that both sides desired to use Bagley as a witness. He was subpoenaed by the defendant, but not by the plaintiff. When he appeared at the office of the attorney of the defendant at about ten o'clock in the morning of the day of trial he was intoxicated, and because of his condition was informed that he was not needed that day, but was requested to be in court the next morning. The plaintiff voluntarily moved his case notwithstanding the absence of the witness. The action upon the part of the defendant's attorney in excusing the witness was, we think, in good faith and evinces no misconduct on his part. The controlling reason why

<sup>1</sup> The opinion of the court on this point is omitted. — Ed.

the plaintiff did not have the benefit of Bagley's testimony was that he had neglected to subpoena him. A new trial will not be granted because of the absence of a witness due to the negligence of the applicant. *Sherrard v. Olden*, 1 Halst. 344; 29 Cyc. 872.

Let the rule to show cause be discharged, with costs.<sup>1</sup>

### WALLER v. GRAVES.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1850.

[Reported 20 *Connecticut*, 305.]

THIS was a petition for a new trial of a cause, which had previously come before this court. *Graves v. Waller*, 19 Conn. R. 90. For the nature of the action and the declaration, it is sufficient, for the present purpose, to refer to the report of that case.

On the trial of the cause to the jury, it became a material question, and one on which the determination of the cause depended, whether the words "rapacious creditor," were in the original manuscript, when it was handed to the editor of the *New Milford Republican*, the newspaper in which it was alleged to have been published, or were inserted in the manuscript or published in the newspaper, by some person, unknown to the petitioner, and without his knowledge; the plaintiff in that suit claiming the former branch of the alternative, and the defendant the latter.

The plaintiff introduced evidence tending to prove his claim. The defendant, on the other hand, introduced Sylvanus Merwin, as a witness, who testified, that he drew up in part the certificate on which the action was founded; that he asked Waller if he would sign it? That Waller asked him what it was? That he then read it over to him; that he made no objection to signing it, and

<sup>1</sup> See 1 *Graham & Waterman*, *New Trials*, 2d ed., Chaps. VI and VII; *Hilliard*, *New Trials*, 2d ed., Chap. XVI; 14 *Encyc. of Pl. and Pr.* 722 *et seq.*

As to the effect of a failure to move for a continuance, see 14 *Encyc. of Pl. and Pr.* 749. In *Shipp v. Suggett*, 9 B. Mon. (Ky.), 5, the court said: "The correct practice in such case is for the party at once, upon the discovery of the cause, during the progress of the trial, which operates as a surprise on him, to move a continuance or postponement of the trial, and not attempt to avail himself of the chance of obtaining a verdict on the evidence he has been able to introduce, and if he should fail, then to apply for a new trial on the ground of surprise. To tolerate such a practice, would have the effect of giving to the party surprised an unreasonable and unfair advantage, and tend to an unnecessary and improper consumption of the time of the court." — *Ed.*

said it was true; that the words "rapacious creditor," were not in it; that he did not tell Waller, that he intended to publish it; and that he, Merwin, sent it to the publisher of the newspaper, but did not authorize the continuance of it the second week; that he saw the piece soon after it was published, and discovered that it was different from the manuscript when sent to the publisher.

On the hearing of the present petition also, Merwin was a witness, and testified, that he did not authorize any one to make any other alterations in the manuscript than such as were necessary to make its language grammatical.

It was also proved, on the trial of the original action, that John Gaylord, at the request of the plaintiff in that action, went to the defendant Waller, with a paper containing the publication claimed to be libellous, and calling his attention to it, asked him if it was true, and if he signed it, and if he authorized its publication? And the witness stated, that Waller answered these questions in the affirmative, and that in the course of the conversation, he read the piece to Waller.

It appeared also, that Joseph K. Averill, referred to in the present petition as the witness who will testify, that the words "rapacious creditor," were inserted in the libellous publication, without the consent or knowledge of Waller, continued to reside in the town of New Milford from the time of the publication to the fall of that year (1846), when he removed to the town of Litchfield, where he remained until about the 1st of May, 1847, previous to the trial, when he left Litchfield, without the knowledge of the petitioner, and has ever since, with the exception of a short residence in the city of Hartford, continued to reside without the limits of this state, and in parts unknown to the petitioner.

The deposition of Averill as to the alteration of the original manuscript, was annexed, and made part of the finding of the court in the case. In that deposition, the deponent testified, that being the publisher of a weekly newspaper in New Milford, entitled *The New Milford Republican*, he published in that paper, in April or May, 1846, a writing signed by Homer Waller of New Milford, reflecting somewhat severely on the character and person of Jedediah Graves, father-in-law of Sylvanus Merwin; that this writing came to the deponent's office in the hand-writing of said Merwin; that the deponent was instructed, by a private note from Merwin, to make such alterations in the body of the writing, as he saw fit, to make it read grammatically, which he did accordingly; that the words "rapacious creditor," and some others, were inserted by the



deponent, without the consent or knowledge of Waller, or even his approbation; and that the substance of the whole writing was materially changed from what it was when it was received by him for publication, without authority from Waller for so doing.

The case was reserved for the advice of this court.

CHURCH, Ch.J. The most aggravated portion of the libel complained of, is that by which the plaintiff, Graves, was exposed to public reproach and contempt, as having, in the character and spirit of a rapacious creditor, shamefully abused Sylvanus Merwin, his son-in-law, and his wife and children.

This charge was libellous, and, in a good degree, gave sting and character to the whole publication, and was the chief ground of the plaintiff's claim to the recovery of damages at the trial, and upon which the issue of the cause was supposed much to depend, as we infer from the allegations in this petition, and found by the court to be true.

The ground of this application for a new trial, is, that from evidence newly discovered, the petitioner Waller, can prove, that the language "rapacious creditor," was never used by him, in composing the article, nor approved by him, but without his knowledge, was inserted by the editor of the newspaper in which it was published, and for which unauthorized act he ought not to be made responsible. If such is the real truth, and if the jury had so believed upon the trial, we think the result would and should have been a different one.

There is, and there should be, reluctance in courts to disturb the verdicts of juries, unless in cases where it is most manifest, that either the law has been perverted or mistaken, or that the losing party has not had a full and impartial hearing. It is easy for a party to claim the discovery of new evidence, and it is hard that his opponent should be compelled to submit to the expense of a second trial, when such claim is either unfounded, or the result of negligence in the first preparation. We feel all this in the present case, and with much hesitation have formed the opinion now declared.

To entitle a party to a new trial for newly discovered evidence, it is indispensable that he should have been diligent in his efforts fully to prepare his cause for a trial, at first; and if the evidence now relied upon could have been known before the trial, by great diligence, and was not, a new trial will not be granted. Here has been our greatest doubt, in this case. But it appears, that the libellous paper was drawn up chiefly by Sylvanus Merwin, and

Waller cannot fairly be presumed to have known or noticed any peculiarity in its phraseology. In hearing it read, he was probably more intent on the narrative of facts, than on the language used in the composition, and therefore, was not put upon enquiry in regard to it, until Averill, the editor, had gone beyond his reach. Averill had not disclosed the facts which he knew, to any body, and while in the vicinity, had every motive to conceal his knowledge of the matter. Under these peculiar circumstances, we cannot say, that Waller omitted any reasonable diligence in preparing his cause for trial.

So if the evidence now claimed to be newly discovered, is merely cumulative evidence, we cannot grant a new trial, unless the effect of it will be to render clear and positive, that which was before equivocal and uncertain.

By cumulative evidence is meant additional evidence of the same general character, to the same fact or point which was the subject of proof before. *Watson v. Delafield*, 2 Caines, 224. *Reed v. McGrew*, 1 Hammond, 386. *Smith v. Brush*, 8 Johns. R. 84. *Pike v. Evans*, 15 Johns. R. 210. *The People v. The Superior Court*, 5 Wend. 114. S. C. 10 Wend. 285. *Guyot v. Butts*, 4 Wend. 579. *Gardner v. Mitchell*, 6 Pick. 114. *Chatfield v. Lathrop, Id.*, 417. *Parker v. Hardy*, 24 Pick. 246.

The fact in dispute, on the trial of this cause, was, whether the words, "rapacious creditor," were a part of the libellous writing, when it was signed by Waller. That they were not, was the most material ground of defence; and this ground was supported, by the testimony of Merwin alone, who wrote the article originally, and who swore that these words were not then in it.

From some of the cases on this subject, it may perhaps be inferred, that courts have supposed all additional evidence to be cumulative merely, which conduced to establish the same ground of claim or defence before relied upon, and that none would be available, for a new trial, unless it disclosed or established some new ground. But this does not seem to us to be the true rule, as recognized in the best considered cases.

There are often various distinct and independent facts going to establish the same ground, on the same issue. Evidence is cumulative which merely multiplies witnesses to any one or more of these facts before investigated, or only adds other circumstances of the same general character. But that evidence which brings to light some new and independent truth of a different character, although it tend to prove the same proposition or ground of claim before

insisted on, is not cumulative within the true meaning of the rule on this subject: as in the present case, Merwin testified only, that the libel, as printed and published, was not like the paper written by him and signed by Waller, in the particular referred to. But now appears a new fact, entirely independent of the testimony of Merwin — one, which did not exist, at the time Merwin speaks of; which is, that another person, without the knowledge or consent of either Waller or Merwin, inserted the objectionable words into the article, which appeared in the newspaper.

Suppose a question on trial to be, whether the note of a deceased person has been paid, and witnesses have been introduced testifying to various facts conducing to prove such payment, and after a verdict for the plaintiff, the executor should discover a receipt or discharge in full, or had discovered that he could prove the deliberate confession of the plaintiff of the payment of the note. There could be no question, in such a case, but a new trial should be granted, although the new facts go to prove the former ground of defence.

But there is another reason, why we believe this new evidence is available. Merwin testified, that the words "rapacious creditor," were not in the paper signed by Waller; the testimony of John Gaylord conduced strongly to show that they were; and probably from this conflict of proof, the jury disregarded this ground of defence. This new evidence would now come in, to render certain a turning point in the case, which had been left in doubt before. 1 Sw. Dig. 787. *Watts, adm'r. v. Howard, adm'r.* 7 Mete. 478.

We shall therefore advise a new trial.

In this opinion, WAITE, STORRS, and HINMAN, Js. concurred.

ELLSWORTH, J. concurred in the principles advanced in such opinion, but did not think them applicable to the present case; and for that reason, would not grant a new trial.

*New trial to be granted.*<sup>1</sup>

<sup>1</sup> See 1 Graham & Waterman, *New Trials*, 2d ed., Chap. XIII; Hilliard, *New Trials*, 2d ed., Chap. XV; 14 *Encyc. of Pl. and Pr.* 790 *et seq.*

In *Glassford v. Lewis*, 82 Hun (N. Y.), 46, 48, 31 N. Y. Supp. 162, the court said:

"It must appear that the evidence has been discovered since the trial; that it could not have been obtained upon the former trial by the exercise of reasonable diligence; that it is material to the issue and goes to the merits of the case; that it is not merely cumulative, and that its character is such that it would probably have changed the result. When these facts appear and the court is satisfied that the ends of justice will be promoted by allowing the moving party an opportunity to present the newly discovered evidence, the motion will be granted." — *Ed.*

## HAWES v. GUSTIN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1861.

[Reported 2 *Allen*, 402.]

COMPLAINT under St. 1859, c. 239, charging the defendant with being the father of a bastard child with which the complainant was pregnant.

There was a trial resulting in a verdict of guilty; the defendant alleged exceptions on the ground of the incompetency of one of the jurors; the exceptions were sustained.

At the second trial in the superior court, before Vose, J., the complainant was called as a witness, and was allowed to testify, under objection, that she in the time of her travail accused the defendant of being the father of her child. The judge, however, before the introduction of any further evidence, ruled, upon reconsideration, that the evidence was incompetent, and directed the answer to be stricken out, saying that it would not be regarded by the jury as a part of the evidence in the case. . . .

The jury returned a verdict of guilty, and the defendant alleged exceptions.<sup>1</sup>

DEWEY, J. The Gen. Sts. c. 72, authorizing proceedings to charge the father of a bastard child with contributing to its maintenance, have materially changed the provisions found in the Rev. Sts. c. 49.

In the particular of requiring the mother to accuse the putative father in the time of her travail, the necessity of proof of such fact no longer exists. It is competent evidence, and may be used as corroborating the testimony of the mother. Such being its purpose, it should of course more properly be shown by the testimony of other persons. If any error was committed by the presiding judge in allowing the mother in the first instance to testify to this fact, it was at once corrected, and the answer of the witness as to the inquiry stricken out; and the jury were instructed not to regard this as a part of the evidence in the case. This it was competent for the court to do, though it is a power to be exercised very cautiously, and accompanied by such statements as will lead the jury fully to understand that the evidence is not to be allowed to have any effect upon their minds. . . . *Exceptions overruled.*<sup>2</sup>

<sup>1</sup> The statement of facts is abridged. — Ed.

<sup>2</sup> But if the effect of the evidence improperly admitted is not really removed, a new trial should be granted. *Waldron v. Waldron*, 156 U. S. 361, 39 L. ed. 453, 15 S. Ct. 383. — Ed.



CHEATHAM *v.* ROBERTS.

SUPREME COURT OF ARKANSAS. 1861.

[Reported 23 *Arkansas*, 651.]

FAIRCHILD, J. Roberts brought an action of assumpsit against Cheatham, on an account for about one hundred and eighty-six dollars, of which nearly all was charged for money advanced to steamboats for freight and charges upon goods left for Cheatham upon the wharf-boat of Roberts; but an item of fifteen dollars was charged for storing the merchandize on which advances had been made, and for storing other merchandize. It did not appear in proof, on the trial, that any other merchandize than that on which advances had been made, had been stored by Roberts, whence it is argued that there is a want of evidence to sustain the charge for storage; but the proof was, that it was worth fifteen dollars to store the goods mentioned in the account.

The only witness, who testified in the case, had personal knowledge of the correctness of the charges, except of the items charged from the 9th of June to the 4th of September, 1856, and these he supposed to be correct, as he had seen the steamboat receipts to Roberts for the amounts charged. This evidence was received by the court sitting as a jury without objection from the defendant. If the testimony had been resisted as incompetent, either when offered, or upon motion to exclude it after it was given, the court would doubtless have sustained the objection to its admissibility, or would have disregarded it at the request of the defendant, as on a motion to exclude, had the trial been by a jury; or, on the motion of the defendant, the court might have declared it as law that the evidence was not to be considered. But when the evidence was before the court sitting as a jury, we cannot say that the court ought not to have taken it into consideration in its finding, any more than we could say a jury should not consider it in making their verdict. In either case, it belongs to the tribunal of fact to judge as it may from the facts proved. When the defendant raised the question upon the legal character of this evidence, for the first time, in his motion for a new trial, he did not present any point of law for adjudication, but only appealed to the discretion of the court for a favor to be extended to him; and its refusal was not an error of law.

*The judgment is affirmed.*

FARR *v.* FULLER.

SUPREME COURT OF IOWA. 1859.

[Reported 8 *Iowa*, 347.]

TRESPASS. Trial and verdict for defendant. Motion for a new trial sustained, and defendant appeals. The other material facts sufficiently appear in the opinion.

WRIGHT, C. J.<sup>1</sup> The record shows that the new trial was granted, "for the reason that the instructions to the jury were, and are, erroneous." These instructions were asked by the defendant and given, and are all embodied in the bill of exceptions. It does not appear that plaintiff made any objections to said instructions, at the time they were given; and the defendant now insists that it was too late to do so, after the rendition of the verdict. To sustain this position, we are referred to the rule recognized by this court, in *Rawlins v. Tucker*, 3 *Iowa*, 213, and other cases, to the effect that a party will not be allowed to assign error upon instructions to which he made no objections at the time they were given. This case does not come within the rule referred to, for the reason that the court below has, by granting a new trial, admitted the error in giving the instructions, and taken steps, at the earliest possible moment, to correct the same. It was perfectly competent for the district court, upon its attention being called to the motion, to order a new trial, when satisfied that an error had been committed to the prejudice of the plaintiff, whether exceptions were taken to the action of the court at the time, or not. While we would not have interfered, if the motion had been overruled, neither will we when granted. . . .

*Judgment affirmed.*<sup>2</sup>

DOE *DEM.* LORD TEYNHAM *v.* TYLER.

COMMON PLEAS. 1830.

[Reported 6 *Bingham*, 561.]

THE question raised in this ejectment was, whether Henry, the twelfth Lord Teynham, was of sound mind when he suffered a recovery in 1789. There was conflicting evidence on the point;

<sup>1</sup> A part of the opinion is omitted. — Ed.

<sup>2</sup> As to the power of the trial court to grant a new trial on the ground of errors of law at the trial to which no exception has been taken, see *Valerius v. Richard*, 57 *Minn.* 443, 59 *N. W.* 534; *Standard Oil Co. v. Amazon Ins. Co.*, 79 *N. Y.* 506. — Ed.

but, in the opinion of the Court and jury, the evidence in favor of his lordship's being of sound mind preponderated, and on that ground a verdict was found for the defendant.

A great number of witnesses spoke to his lordship's competency to transact all ordinary business; and, among other evidence to this effect, the accounts of a deceased steward were put in, which it was assumed his lordship had examined and settled.

These accounts were handed to the jury, and commented on by the counsel for the defendant as being important to his case.

The accounts, however, purporting to discharge the steward as well as to charge him.

*Jones* Serjt. obtained a rule *nisi* for a new trial, on the ground, among other objections (see *ante*, 390), that those accounts had been improperly received in evidence, inasmuch as on the whole they tended to discharge the steward; and the only ground on which such documents could be received in evidence, was, as charging the deceased person, and so being against his interest. *Warren v. Greenville*, 2 Str. 1129, *Goodtitle v. Chandos*, 2 Burr. 1065, *Higham v. Ridgway*, 10 East, 109, *Outram v. Morewood*, 5 T. R. 121, *Roe dem. Brune v. Rawlings*, 7 East, 279, *Calvert v. Archbishop of Canterbury*, 2 Esp. 646, *Barry v. Bebbington*, 4 T. R. 514.

The court, upon hearing the report of the trial read, stopped *Wilde* Serjt., who was to have shewn cause, and called on *Jones*, to shew that there was not enough to sustain the verdict, independently of the evidence objected to.

He contended, that it was impossible for the court to discriminate between the effects produced by each parcel of evidence on the mind of the jury, or to determine that the verdict was not altogether occasioned by the very lot of evidence now objected to; and that a new trial ought to be granted, if that evidence were clearly inadmissible.

TINDAL, C. J. This rule must be discharged. I will assume for the purpose of this discussion, though I give no opinion on the point, as we have not heard the other side, that the evidence in question ought not to have been received. But the Court will not close their eyes to the rest of the evidence; and if they see that there is enough, not merely to make the scales hang even, but greatly to preponderate in favour of the defendant, they will not send the cause to a jury again. It has been contended, that we are to analyse the evidence by a difficult process, and to discriminate the precise effect produced on the mind of the jury of each portion of the proof: but we have a much plainer course; and that is, to

hear the report of the trial, and to sustain the verdict, if we are satisfied that there is enough to warrant the finding of the jury independently of the evidence objected to. On this principle, the decisions in *Horford v. Wilson*, 1 Taunt. 12, and *Nathan v. Buckley*, 2 B. Moore, 153, are quite in point; and we cannot send the cause to a new trial when the jury are right upon that portion of the evidence which is unimpeached.

PARK, J. I am of the same opinion. I will assume, for the purpose of this argument, that the evidence in question ought not to have been admitted; but when we look at the rest of the evidence in the cause, its reception does not offer the slightest ground of objection to the verdict. It has been repeatedly ruled, that though particular portions of evidence are objected to, if the rest be sufficient to warrant the conclusion to which the jury have come, the Court will not interpose. In *Horford v. Wilson*, Mansfield C. J. said, "The Court will not set aside a verdict on account of the admission of evidence which ought not to have been received, provided there be sufficient without it to authorize the finding of the jury"; and the counsel for the defendant never objected. The same rule was acted on in the King's Bench, in *Edwards v. Evans*, 3 East, 451, and then, in *Nathan v. Buckley*. This is no new point, and we are not exceeding the line of our duty in determining whether or not the verdict is warranted by that portion of the evidence which is not objected to.

GASELEE, J. The evidence objected to was intended to shew only one of various acts, which all tended to shew that the party, whose competency was in question, possessed sufficient faculties to transact the ordinary business of life. Its reception, therefore, could not have had any material influence on the jury; and, as the lessor of the plaintiff is not precluded from commencing another ejectment, I concur in thinking that this rule ought to be discharged.

BOSANQUET, J. The granting a new trial is a matter of discretion in the court, a discretion indeed, not to be exercised capriciously, but according to the rules and practice of the Court: and I think we may, according to those rules, refuse a new trial in this case; there being evidence amply sufficient to support the verdict, exclusively of the evidence objected to. *Rule discharged.*<sup>1</sup>

<sup>1</sup> See 1 Wigmore, Evidence, sec. 21; Wigmore, Pocket Code of Evidence sec. 102. — Ed.



BARON de RUTZEN and his wife *v.* FARR.

KING'S BENCH. 1835.

[Reported 4 *Adolphus and Ellis*, 53.]

LORD DENMAN, C. J.<sup>1</sup> In order to prove the plaintiff's title to a market, for disturbing which this action was brought, recourse was had to certain leases found among their muniments, and also to certain accounts of rent for the same market, found in the same place. Some of these were accounts signed by the person who was then steward to the plaintiff's ancestor, wherein he charged himself with the amount of such rents. To these no objection was made. Other accounts, of the same nature, were produced, signed, not by such steward, but by a person styling himself clerk to such steward. There was no parol evidence to shew that this person was ever employed by the steward; but the papers were tendered as speaking for themselves. They were severally objected to when tendered, but the learned Judge admitted them in evidence. We are clearly of opinion that they were not admissible, because they do not purport to charge the person whose signature they bear.

We were, however, strongly urged to discharge this rule for a new trial, even though this evidence may have been improperly received, on account of the manifest preponderance of the proof arising from that which was unobjectionable. To induce us to adopt this course, *Doe dem. Lord Teynham v. Tyler*, 6 Bing. 561, was strongly pressed upon us, founded as it was upon some former precedents both in this Court and in the Common Pleas. The same argument was urged in the Court of Exchequer, where evidence had been improperly rejected, in *Crease v. Barrett*, 1 Cr. M. & R. 919, S. C. 3 Tyrwh. 458; but the answer was given: It may be that the evidence may be readily explained, and may not weigh in the least against the very strong evidence to which it was opposed; but we cannot, on that account, refuse to submit the question to the consideration of another jury. Mr. Baron Parke, who pronounced the judgment of that court, discusses the point at large; and a new trial was granted, because the Court could not say that if the evidence had been received it would have had no effect with the jury; nor that it was clear, beyond all doubt, if the verdict had been the other way, that it would have been set aside as improper.

<sup>1</sup> Only the opinion of the court is given. — ED.

In like manner, we are not convinced that the documents improperly admitted did not weigh with the jury in forming their opinion, or that their verdict, if given for the defendant, must have been set aside as against evidence. On this point, therefore, the rule must be made absolute; and we need not refer to the numerous other points that have been debated. *Rule absolute.*<sup>1</sup>

## DYER v. UNION RAILROAD COMPANY.

SUPREME COURT OF RHODE ISLAND. 1903.

[Reported 25 *Rhode Island*, 221.]

TRESPASS on the Case for negligence. Heard on petition of defendant for new trial, and petition denied.

PER CURIAM. The court is of the opinion that evidence as to the failure to ring the bell on the car in question at the intersection of other streets prior to the time of the accident was not proper. *Agulino v. R. R. Co.*, 21 R. I. 263. But a consideration of the evidence shows that the negligence of the defendant was so clearly established that a new trial would be of no avail, since it clearly appears that the plaintiff was overtaken from the rear by the car of the defendant company, which was then running at a high and excessive rate of speed. And the court fails to find that the damages awarded were excessive.

Petition for new trial denied.<sup>2</sup>

<sup>1</sup> The Rules of the Supreme Court, 1883, Order XXXIX, rule 6 (R. S. C. (Aug.), 1913), provide that "A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been thereby occasioned." — ED.

<sup>2</sup> For conflicting decisions in the United States, see 1 Wigmore, Evidence, sec. 21.

The New Jersey Practice Act (1912), sec. 27, provides: "No judgment shall be reversed, or new trial granted on the ground of misdirection, or the improper admission or exclusion of evidence, or for error as to matter of pleading or procedure, unless, after examination of the whole case, it shall appear that the error injuriously affected the substantial rights of a party." — ED.

SAVERY *v.* BUSICK.

SUPREME COURT OF IOWA. 1861.

[Reported 11 *Iowa*, 487.]

ON the 12th of October, 1857, defendant confessed a judgment before the clerk of the District Court for the sum of three hundred and nine dollars and fifty cents, being the supposed balance due the plaintiff on a fifteen hundred dollar note, dated the 21st of July and payable in six months. It was afterwards ascertained that a mistake had been made in the computation of interest on said note, and that the true balance due was \$384.50, being seventy-five dollars more than the amount for which judgment was confessed. This last named sum plaintiff alleges that the defendant afterwards made a parol promise to pay. Failing to do so, a suit was brought upon said promise to recover the seventy-five dollars before a magistrate. A trial being had, a judgment was rendered in favor of plaintiff for the amount of his claim. The cause was taken by appeal to the District Court, and on a second trial there, the plaintiff claimed to have shown the mistake of seventy-five dollars in the confession of the judgment aforesaid, and the defendant's promise to pay the same, and asked the court to say to the jury that upon this state of facts the plaintiff was entitled to recover; that a moral consideration is sufficient to support a promise in cases where there was originally a sufficient valuable consideration upon which an action could have been sustained, notwithstanding some positive rule of law might exempt the party from liability.

The court refused such instruction, and at the instance of defendant told the jury in substance that a mistake in the confession of the judgment spoken of was no sufficient consideration in law, to support a promise to pay the amount of the mistake; that such mistake could only be rectified by appeal to the Supreme Court, or motion to the court rendering the judgment, or by proceeding in equity; and that if the jury should find from the evidence that a judgment had been rendered in the District Court upon a note which constituted any part of the claim or promise sued upon, they should find for the defendant.

The jury in their retirement gave a verdict for plaintiff directly against the instructions of the court, which, upon motion was set aside, and a new trial granted. From this ruling of the court the appeal comes.

LOWE, C. J. Whatever may be our view of the law of this case, it is impossible for us to express it, or consider the questions presented, without going behind the action of the jury in trampling upon the authority of the court, and thereby giving some countenance to their assumption. This we are unwilling to do even by the slightest implication.

It is no more competent for the jury to usurp the powers of the court, than it is for the court to interfere with their province in the ascertainment of facts. And when the jury, in this case, arrogated to themselves the right to determine the law in direct opposition to the instructions given them by the court, they were guilty of a flagrant abuse of their duties and obligations; and we will not review this case until it is tried upon the law as it shall be expounded by the court and not by the jury.

*Affirmed.*<sup>1</sup>

## SLADE'S CASE.

KING'S BENCH. 1648.

[Reported *Style*, 138.]

THE Court was moved for Judgment formerly stayed upon a certificate made by Baron Atkins, that the verdict passed against his opinion, Bacon Justice said, Judgments have been arrested in the Common pleas, upon such certificates. Hales of Councell with the Defendant prayed, that this Judgment might be arrested, and that there might be a new tryal, for that it hath been done heretofore in like cases. But Roll Justice held, it ought not to be stayed, though it have been done in the Common pleas, for it was too Arbitrary for them to do it, and you may have your attain against the Jury, and there is no other remedy in Law for you; but it were good to advise the party to suffer a new tryal for better satisfaction. And let the Defendant take four dayes from hence to speak in arrest of Judgment if the postea be brought in, if not, then four dayes from the time it shall be brought in.

<sup>1</sup> Seevers v. Cleveland Coal Co., (Ia., 1912) 138 N. W. 793; Lynch v. Snead Architectural Iron Works, 132 Ky. 241, 116 S. W. 693, 21 L. R. A. (n. s.), 852, *accord*. Galligan v. Woonsocket St. Ry. Co., 27 R. I. 363, 62 Atl. 376, *contra*. Compare Butterhof v. Butterhof, 84 N. J. L. 285, 86 Atl. 394. — ED.



CUNNINGHAM *et al.* v. MAGOUN *et al.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1836.

[Reported 18 *Pickering*, 13.]

ASSUMPSIT for goods sold and delivered. Holwell, one of the defendants, did not appear. The other defendant, John Magoun, pleaded, that he never promised jointly with Holwell. At the first trial of this cause, a verdict was returned for the defendant; but a new trial was granted, on the ground that the verdict was against the evidence.

The second trial was before Wilde, J. It was admitted, on the part of the plaintiffs, that the bargain was made in the name of Holwell only, and that the goods were charged to him on the books of the plaintiffs.

Witnesses were produced on both sides, to prove and disprove, respectively, the existence of a partnership between Holwell and Magoun. The jury returned a verdict for the defendant. The plaintiffs moved for a new trial, on the ground, that the verdict was against the evidence.

SHAW, C. J. The principles upon which new trials are granted, are now pretty well settled; and in general the difficulty arises, not so much from the uncertainty of the rules, as from the almost infinitely varied combinations of circumstances to which they are to be applied.

The great principle, which is at the basis of jury trial, is never to be lost sight of, that to all matters of law, the court are to answer, to all controverted facts, the jury. The verdict of a jury is practically to be taken for truth.

Formerly this distinction was effectually preserved, by special pleading, whereby juries were compelled to answer yes or no, to a precise fact, averred on one side and denied on the other, and by attainments and other expedients, where juries departed from the truth, through prejudice or corrupt motives. But by the prevailing use, in modern practice, of general declarations and general issues, the jury is in most cases left to find a general verdict, which necessarily embraces the whole matter of law and fact. The mode of trial therefore necessarily is, when the evidence is out, for the court to direct the jury hypothetically, adapting the instructions in point of law to the state of evidence, putting it to the jury to return a verdict for the plaintiff or defendant, as they shall find certain facts proved to their satisfaction or otherwise, by the evi-

dence. The consequence obviously is, that the jury, in finding a general verdict, do in form return a verdict embracing the matter of law as well as fact; and, therefore, as they may mistake the instructions of the court, or may take the law into their own hands, imagining it to be severe or inequitable, they may return a verdict manifestly against the law and truth of the case. To render such a mode of trial safe and tolerable, there must exist a power somewhere, to re-examine verdicts with some freedom, and when it is manifest that juries have been warped from the direct line of their duty, by mistake, prejudice, or even by an honest desire to reach the supposed equity, contrary to the law of the case, it will be the duty of the court to set the verdict aside. When, therefore, the evidence is clear, plain and strong, and the law has been clearly and explicitly stated to the jury, and they decide against the law, it imposes upon the court the duty of interfering, because it must be apparent, that the jury have either unintentionally erred, by mistaking the terms of their instructions, or misapprehended the weight of the evidence, or that they have mistaken their duty or abused their trust. This will be more readily presumed in case of a single verdict, than in case of a second verdict the same way.

But where the question is purely matter of fact, where there is evidence for the minds of the jury actually and fairly to weigh and balance, where presumptions are to be raised and inferences drawn, and the jury may be presumed fairly to have exercised their judgment, a court will not feel at liberty to set a verdict aside, although upon the same evidence they would have decided the other way. This consideration is somewhat strengthened, where the verdict is against the party having the burden of proof.

After an examination of the evidence, the judge concluded thus: In the present case, though there was strong evidence to prove a partnership, yet there was evidence the other way, the burden of proof was upon the plaintiffs, and two juries on the evidence have decided against them. We do not feel warranted in saying that they have done wrong.

*Judgment on the verdict.*<sup>1</sup>

<sup>1</sup> Compare *Sprague v. Michell*, 2 Chit. Rep. 271; *Clark v. Whittaker*, 19 Conn. 319. — Ed.

JONES *v.* SPENCER.

HOUSE OF LORDS. 1897.

[Reported 77 *Law Times Reports*, 536.]

THIS was an appeal from an order of the Court of Appeal (Lord Esher, M.R. and Chitty, L.J., Lopes, L.J. dissenting) refusing a new trial in an action tried before Lawrance, J. and a jury.

The action was brought by the respondent, a horse-dealer in London, against the appellant, a farmer at Bromsgrove, in Worcestershire, to recover the sum of 70*l.* for breach of a warranty of a carhorse which the respondent had purchased from the appellant on a warranty that the horse was at the time of the purchase "a good worker."

The case of the respondent was that on the arrival of the horse by train in London it was immediately found to be "a shiverer," and as such unable to back, and consequently not a good worker.

In support of his case the respondent called several veterinary surgeons who had examined the animal shortly after its arrival in London, and pronounced it to be a very bad shiverer and suffering from a disease which must have been in existence at the time of its purchase by the respondent.

On the other hand, the appellant called a number of witnesses who had used the animal continually, and swore that up to the time of the sale the animal was perfectly sound and had shown no symptom of shivering.

The jury found for the respondent for the amount claimed.

The appellant thereupon applied to the Court of Appeal for a new trial, on the ground that the verdict was against the weight of evidence.

In the course of his judgment Lord Esher, M.R. remarked that, short of perverseness on the part of a jury, it was nearly, if not quite, impossible that a new trial could be obtained, on the ground that a verdict was against the weight of evidence when there was conflicting evidence in the case.

Lopes, L.J. thought that the Court of Appeal had gone rather too far in refusing new trials in such cases, and that it was clear from the judgment delivered in the House of Lords in the case of the Metropolitan Railway Company *v.* Wright (54 L. T. Rep. 658; 11 App. Cas. 152) that a new trial ought to be granted if it were necessary to prevent a miscarriage of justice.

At the conclusion of the arguments their Lordships gave judgment as follows: —

The LORD CHANCELLOR (Halsbury).<sup>1</sup> My Lords: I believe that your Lordships are all agreed that the result of this trial was unsatisfactory. I do not purpose to enter into the question of the evidence, because, according to a rule which has been established now for a great number of years, when a verdict is being set aside, it is not desirable that the judges who take part in the discussion of the question whether or not there shall be a new trial, should make any observations about what the effect of the evidence was, or what might or might not have been the proper course to pursue; because such observations are likely to prejudice the trial which may come on afterwards; therefore, that matter ought to be left untouched by the tribunal which orders the new trial. For these reasons I do not propose to enter into the question of the exact position which might or might not be assumed by either of the parties when the new trial actually takes place; it is enough for me to say that I think that, taking either of the two views which have been suggested more than once in the course of the argument, either that the jury were wrong in what they did, or that it was not sufficiently apparent what was the question which they had to determine; at all events, the result is unsatisfactory, and the cause must be remitted for another trial. I have the less hesitation in coming to that conclusion, and so overruling the Court of Appeal, because that court does not appear to me (with great respect to the majority) to have applied its mind to the question which really arose, but they proceeded, apparently, upon some construction which had been placed upon a former decision of your Lordships, introducing, as was said, a new rule in a case of this sort. I am not aware that the Court of Appeal or this House have a right to introduce any new rule on the subject of a new trial; the question has been many times discussed, and certainly, so far as I am concerned, in using the language which I am reported to have used in delivering judgment in the case of *Metropolitan Railway Company v. Wright* (54 L. T. Rep. 658; 11 App. Cas. 152), I was not under the impression that I was suggesting any new rule. I merely gave expression to what I have always believed to be the rule ever since I entered the profession. It is a rule which I see no reason to alter, even if I had jurisdiction to do so, which I have not. I am confident in the belief that I gave utterance to no new rule, or

<sup>1</sup> Concurring opinions of Lords Herschell, Macnaghten, Morris and Shand, are omitted. — Ed.



suggested that anything had happened in later times to alter the established rule. I have been looking into the authorities to see what can have given rise to the impression that it was a new rule, and I find that, in the case of *Rafael v. Verelst* (2 Wm. Bl. 987), now more than a century ago, De Grey, C. J., said in substance very much what I said in *Metropolitan Railway Company v. Wright*. He says, "This verdict is not against the evidence. The court will not set it aside merely because they might have given it the other way." If there is a question of fact left to the jury, and they have reasonably answered it, their verdict cannot be disturbed. I am not aware of any observation of my own in the case of *Metropolitan Railway Company v. Wright* which would suggest any other rule than that which has certainly been held as established with the authority of that learned judge more than a century ago. I have thought it right to say this because some misapprehension appears to have existed in the mind of Lord Esher, M.R. that your Lordships in this House had laid down a new rule. He appears to have said that now it is almost impossible to get a new trial; I am not aware of the impossibility, and I am not aware of any authority in this House to lay down any such new rule on the subject. For these reasons I move your Lordships that this judgment be reversed, and that the respondent pay to the appellant the costs both of the appeal to the Court of Appeal and in this House, and that the costs of the former trial and the costs of the new trial should depend upon the result of that trial.<sup>1</sup>

BROWN, by his next friend, *v.* THE PATERSON PARCHMENT PAPER COMPANY.

SUPREME COURT OF NEW JERSEY. 1903.

[Reported 69 *New Jersey Law*, 474.]

ON rule to show cause.

Before GUMMERE, CHIEF JUSTICE, and Justices FORT and PITNEY.

FORT, J. The plaintiff recovered a verdict in the above-entitled cause for personal injuries. The character of the injuries was not controverted, nor is there any contention here that the damages awarded were excessive.

<sup>1</sup> Compare *Voge v. Penney*, 74 Minn. 525, 77 N. W. 422; and see *McDonald v. Metropolitan St. Ry. Co.*, 167 N. Y. 66, 60 N. E. 282, *supra*, p. 324. See Thayer, *Preliminary Treatise on Evidence*, 208-210. — Ed.

There are no errors found in the charge or the refusals to charge of the learned trial justice.

The only remaining question is whether the verdict should be set aside because against the weight of the evidence.

This is the second trial of the issue in this cause, a former verdict in the cause having been set aside because against the weight of the evidence. *Brown v. Parchment Paper Co.*, 36 Vroom 111.

While in this state there is no statute, or rule established by decisions, limiting the number of times the court may set aside a verdict and grant a new trial because it is against the weight of the evidence, still a second concurring verdict upon the same state of facts or on slightly varying evidence should cause the court to hesitate before granting a third trial.

The verdict upon a second trial should not be set aside because against the weight of evidence unless the court is satisfied from the evidence in the cause that it must have been the result of (1) the disregarding of the force of the whole range of the unimpeached testimony, or (2) the palpable failure to give proper force to the unimpeached evidence in the cause offered by the party against whom the verdict is found, or (3) the giving to the testimony of the prevailing party a force to which, under the law and the facts, it was not entitled, or (4) the verdict must have been controlled by prejudice, partiality or passion, and not based upon the weighing of the conflicting testimony in the cause.

Judge Allen, speaking for the Supreme Court of Massachusetts, declares that "in this commonwealth there is no rule of law limiting the number of times that a judge may set aside a verdict as against the evidence. On the other hand, it has been recognized that in an extraordinary case the court may set aside any number of verdicts that might be returned." *Clark v. Jenkins*, 162 Mass. 397.

We would adopt the same rule, but think a second verdict to be set aside should have in it some one, at least, of the objectionable elements above indicated.

In some of the states there are statutes limiting the right of the court to set aside a second concurring verdict. In others, such limitation is imposed by a well-settled line of decisions. These cases are gathered and discussed in 14 *Encycl. Pl. & Pr.* 993.

In the case before us there are facts from which the jury could reasonably find for the plaintiff, a boy of fourteen years of age, who was placed to work at a machine, the danger in operating which, if he was told to sprinkle the rollers, as he says he was, should have

been pointed out to him. That they were not the jury have found, and they have also found that such dangers were not obvious to a boy of his years and experience. There is evidence from which the jury might have found both these facts the other way, but, as upon both trials in this cause the jury have found these facts in favor of the plaintiff, we think, under the circumstances of the case, the rule to show cause should be discharged.

WOOD *v.* GUNSTON.

UPPER BENCH. 1655.

[Reported *Style*, 466.]

Wood brought an action upon the case against Gunston for speaking of scandalous words of him; and amongst other words for calling him Traytor, and obteyns a verdict against him at the Bar, wherein the Jury gave 1500*l.* dammages. Upon the supposition that the dammages were excessive, and that the Jury did favour the Plaintiff, the Defendant moved for a new tryal. But Sergeant Maynard opposed it, and said that after a verdict the partiality of the jury ought not to be questioned, nor is there any Presidents for it in our Books of the Law, and it would be of dangerous consequence if it should be suffered, and the greatness of the dammages given can be no cause for a new tryal, but if it were, the dammages are not here excessive, if the words spoken be well considered, for they tend to take away the Plaintiff's estate and his life. Windham on the other side pressed for a new tryal, and said it was a packed business, else there could not have been so great dammages, and the Court hath power in extraordinary cases, such as this is, to grant a new tryal. Glyn chief Justice, It is in the discretion of the Court in some cases to grant a new tryal, but this must be a judicial, and not an arbitrary discretion, and it is frequent in our Books for the Court to take notice of miscarriages of Juries, and to grant new trials upon them, and it is for the peoples benefit that it should be so for a Jury may sometimes by indirect dealings be moved to side with one party and not to be indifferent betwixt them, but it cannot be so intended of the Court; wherefore let there be a new tryal the next Term, and the Defendant shall pay full Costs, and judgment to be upon this Verdict to stand for security to pay what shall be recovered upon the next verdict.<sup>1</sup>

<sup>1</sup> See Thayer, Preliminary Treatise on Evidence, 170. — Ed.

## PRAED v. GRAHAM.

COURT OF APPEAL. 1889.

[Reported 24 *Queen's Bench Division*, 53.]

APPEAL from a decision of the Queen's Bench Division.

In an action to recover damages for a libel contained in a letter written by the defendant to the plaintiff's wife, the jury gave a verdict for the plaintiff and assessed the damages at 500*l*.

The defendant having moved for a new trial on the ground (*inter alia*) that the damages were excessive, the Queen's Bench Division dismissed the motion.

The defendant appealed.

*Fillan*, for the appellant, contended (*inter alia*) that the damages were so excessive as to come within the definition which Palles, C. B., in *McGrath v. Bourne*, 10 Ir. Rep. C. L. (Ex.) 160, said had been stated by Fitzgerald, J., namely, that in order to justify the Court in granting a new trial on the ground of excessive damages, "the amount should be such that no reasonable proportion exists between it and the circumstances of the case."

*Lockwood, Q. C. (Atherly Jones, with him)*, was asked to argue the question of damages only.

The older authorities shew that the Court will not grant a new trial unless they can trace out some misconduct, or gross error, or misconception, on the part of the jury in assessing the damages: see *Mayne on Damages*, 4th Ed., p. 553, and the cases there collected. There is nothing to shew any such misconduct or error in the present case. If the true definition be that the amount must be so large that no jury could reasonably have arrived at it, the amount in this case, having regard to all the circumstances, does not satisfy that definition. It certainly seems reasonable that, with respect to granting a new trial on the ground of excessive damages, the Court should act upon the same rule as is applied when a new trial is asked for on the ground that the verdict is against the weight of evidence. The jury were entitled to consider the defendant's whole conduct in the matter from the time the libel was published down to and at the trial, and to assess the damages accordingly.

*Fillan*, replied.

LORD ESHER, M. R. In this case two questions of law have been discussed which I desire to notice. The first question is, what is the rule of conduct which should be followed by the Court



— either a Divisional Court or the Court of Appeal — to which an application is made in such an action as an action for a libel to set aside the verdict on the ground that the damages given by the jury are excessive? I think that the rule of conduct is as nearly as possible the same as where the Court is asked to set aside a verdict on the ground that it is against the weight of evidence. If the Court, having fully considered the whole of the circumstances of the case, come to this conclusion only: — “We think that the damages are larger than we ourselves should have given, but not so large as that twelve sensible men could not reasonably have given them,” then they ought not to interfere with the verdict. If, on the other hand, the Court thinks that, having regard to all the circumstances of the case, the damages are so excessive that no twelve men could reasonably have given them, then they ought to interfere with the verdict. If the authorities are looked at that will be found to be the rule of conduct which the judges have adopted. If the Court can see that the jury in assessing damages have been guilty of misconduct, or made some gross blunder, or have been misled by the speeches of the counsel, those are undoubtedly sufficient grounds for interfering with the verdict, but they come within the larger rule of conduct which I have laid down, and are grounds which are included in that rule. I think that the proposition said to have been stated by Fitzgerald, J., is equivalent to the one I have stated.

I desire also to say that in actions of libel there is another rule, which is this: — the jury in assessing damages are entitled to look at the whole conduct of the defendant from the time the libel was published down to the time they give their verdict. They may consider what his conduct has been before action, after action, and in court during the trial. [His Lordship then proceeded to deal with the facts of the case, and came to the conclusion that the jury might, not unreasonably, have given the damages which they gave.]

LINDLEY and LOPES, L.JJ., concurred.

*Appeal dismissed.*

## PHILLIPS v. THE SOUTH WESTERN RAILWAY COMPANY.

HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION.  
1879.[Reported 4 *Queen's Bench Division*, 406.]<sup>1</sup>

COCKBURN, C. J. This was an action brought by the plaintiff to recover damages for injuries suffered, when travelling on the defendants' railway, through the negligence of their servants. A verdict having passed for the plaintiff with 7000*l.* damages, an application is made to this Court for a new trial, on behalf of the plaintiff, on the ground of the insufficiency of the damages as well as on that of misdirection as having led to an insufficient assessment of damages; and we are of opinion that the rule for a new trial must be made absolute; not indeed on the ground of misdirection, for we are unable to find any misdirection, the learned judge having in effect left the question of damages to the jury, with a due caution as to the limit of compensation, though we think it might have been more explicit as to the elements of damage.

It is extremely difficult to lay down any precise rule as to the measure of damages in cases of personal injury like the present. No doubt, as a general rule, where injury is caused to one person by the wrongful or negligent act of another, the compensation should be commensurate to the injury sustained. But there are personal injuries for which no amount of pecuniary damages would afford adequate compensation, while, on the other hand, the attempt to award full compensation in damages might be attended with ruinous consequences to defendants who cannot always, even by the utmost care, protect themselves against carelessness of persons in their employ. Generally speaking, we agree with the rule as laid down by Brett, J., in *Rowley v. London and North Western Ry. Co.* an action brought on the 9 & 10 Vict. c. 93, that a jury in these cases "must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider under all the circumstances a fair compensation." And this is in effect what was said by Mr. Justice Field to the jury in the present case. But we think that a jury cannot be said to take a reasonable view of the case unless they consider and take into

<sup>1</sup> Affirmed 5 Q. B. D. 78. — Ed.

account all the heads of damage in respect of which a plaintiff complaining of a personal injury is entitled to compensation. These are the bodily injury sustained; the pain undergone; the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent; the expenses incidental to attempts to effect a cure, or to lessen the amount of injury; the pecuniary loss sustained through inability to attend to a profession or business as to which, again, the injury may be of a temporary character, or may be such as to incapacitate the party for the remainder of his life. If a jury have taken all these elements of damage into consideration, and have awarded what they deemed to be fair and reasonable compensation under all the circumstances of the case, a Court ought not, unless under very exceptional circumstances, to disturb their verdict. But looking to the figures in the present case, it seems to us that the jury must have omitted to take into account some of the heads of damage which were properly involved in the plaintiff's claim.

The plaintiff was a man of middle age and of robust health. His health has been irreparably injured to such a degree as to render life a burden and source of the utmost misery. He has undergone a great amount of pain and suffering. The probability is that he will never recover. His condition is at once helpless and hopeless. The expenses incurred by reason of the accident have already amounted to 1000*l*. Medical attendance still is and is likely to be for a long time necessary. He was making an income of 5000*l*. a year, the amount of which has been positively lost for sixteen months between the accident and the trial, through his total incapacity to attend to his professional business. The positive pecuniary loss thus sustained all but swallows up the greater portion of the damages awarded by the jury. It leaves little or nothing for health permanently destroyed and income permanently lost. We are therefore led to the conclusion, not only that the damages are inadequate but, that the jury must have omitted to take into consideration some of the elements of damage which ought to have been taken into account.

It was contended, on behalf of the defendants, that even assuming the damages to be inadequate, the Court ought not on that account to set aside the verdict and direct a new trial, inadequacy of damages not being a sufficient ground for granting a new trial in an action of tort, unless there has been misdirection, or misconduct in the jury, or miscalculation, in support of which position the cases of *Rendall v. Hayward*, and *Forsdike v. Stone* were relied

on. But in both those cases the action was for slander, in which, as was observed by the judges in the latter case, the jury may consider, not only what the plaintiff ought to receive, but what the defendant ought to pay. We think the rule contended for has no application in a case of personal injury, and that it is perfectly competent to us if we think the damages unreasonably small to order a new trial at the instance of the plaintiff. There can be no doubt of the power of the Court to grant a new trial where in such an action the damages are excessive. There can be no reason why the same principle should not apply where they are insufficient to meet the justice of the case.

The rule must therefore be made absolute for a new trial.

*Rule absolute.*<sup>1</sup>

## DETZUR v. B. STROH BREWING CO.

SUPREME COURT OF MICHIGAN. 1899.

[Reported 119 *Michigan*, 282.]

HOOKE, J.<sup>2</sup> The plaintiff was injured by a piece of glass, which fell from a window of the defendant's building, cutting her arm severely, and permanently impairing its use, according to some of the testimony in the case. There is testimony upon the part of the plaintiff tending to show that a round window in the upper story was broken for some days or weeks before the accident, and that it was a piece of glass from this window which injured the plaintiff. The defendant offered testimony tending to show that there was no broken window in the building on the day before the accident, and that the glass causing the injury came from a square window, in a lower story, and its fall was caused by a high wind blowing at the time. The theory of the only count relied upon is that the defendant created and maintained a nuisance, in an insecurely fastened and broken window sash and glass, whereby the plaintiff was injured. A verdict of \$10,000 was rendered in behalf of the plaintiff. A motion being made for a new trial, the court denied

<sup>1</sup> See *Falvey v. Stanford*, L. R. 10 Q. B. 54; *Simmons v. Fish*, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912, D, p. 588; *McDonald v. Walter*, 40 N. Y. 551; *Benton v. Collins*, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33; *Toledo Railways & Light Co. v. Mason*, 81 Oh. St. 463, 91 N. E. 292, 28 L. R. A. (N. S.), 130. See also *Sundgren v. Stevens*, 86 Kan. 154, 119 Pac. 322, 39 L. R. A. (N. S.), 487. — ED.

<sup>2</sup> A part of the opinion is omitted. — ED.



the same, upon condition that the plaintiff remit the sum of \$6,500 from the verdict, which was done. The defendant has brought error. . . .

A motion for a new trial was made upon the following grounds:

1. The damages are excessive.
2. The damages are so excessive as to evince passion, prejudice, partiality, or corruption of the jury.
3. The verdict is against the weight of evidence.

The court found that the damages were excessive; that they were not so excessive as to evince passion, prejudice, or corruption, and that they do not exist; that the jurors were so moved by sympathy for the plaintiff, and by their common knowledge of the financial ability of the defendant, and their belief of large amounts expended by the defendant for medical expert evidence, as to have awarded a larger amount than they otherwise would have done, and to that extent partiality is found; that the verdict is not contrary to, or against the weight of, the evidence. An order was then made ordering a new trial, unless \$6,500 should be remitted from the verdict. Error is assigned upon this order. Counsel argue that \$3,500 is excessive damage for a stiff arm; but we cannot say that it is so clearly excessive as to justify our interference upon that ground. We are also of the opinion that making a new trial dependent upon a refusal to remit a portion of the verdict in cases of this kind is a well-settled practice in this State, where, as in this case, the amount of unliquidated damage is the only question involved. It has always been considered lawful for the trial judge in such a case to set aside a verdict as excessive; and it has been a common practice to grant a portion of the relief asked by requiring a remission of a portion of the verdict as a condition upon which the new trial will be denied. This has always been a matter of discretion, and, where it is not clearly erroneous, the action of the trial court should not be disturbed.

Several other questions are raised, but our investigation of them leads to the conviction that they do not furnish a ground for reversal of the case. We think it unnecessary to discuss them. The jury found a cause of action, and that left merely the question of the amount of damages to be awarded. These involved pain and suffering, and prospective as well as past deprivation of the use of the arm. Such damages are not altogether a matter of mathematical computation, but they are determined by the consensus of opinion of the jury, acting under the direction of the

judge. The question of new trial was within the discretion of the court.

The judgment of the circuit court is affirmed.<sup>1</sup>

The other Justices concurred.

TROW v. VILLAGE OF WHITE BEAR.

SUPREME COURT OF MINNESOTA. 1899.

[Reported 78 *Minnesota*, 432.]

BROWN, J. This action is one to recover damages for injuries to plaintiff's person, caused, as is alleged in the complaint, by a defective sidewalk located within the corporation limits of defendant village. A verdict was returned in the court below in plaintiff's favor for the sum of \$1,400. The defendant moved that court for a new trial on the grounds: (1) Excessive damages, appearing to have been given under the influence of passion and prejudice; and (2) that the verdict is not justified by the evidence, and is contrary to law. The court made an order granting the motion unless plaintiff should consent to remit from the verdict all in excess of \$800, but denying it in case she should so remit. Plaintiff filed a proper remittitur, judgment was thereupon entered in her favor for \$800 and costs, and defendant appeals.

1. The first question presented by appellant is whether a new trial should not be granted, as a matter of right, when it is determined by the trial court that excessive damages have been awarded by a jury under the influence of passion and prejudice.

The position of appellant's counsel is that, where it is determined by the trial court that excessive damages have been so awarded by a jury, a new trial should be granted, and the error of the jury cannot be corrected by a reduction of the verdict. Taken from a statutory point of view, there is, in the opinion of the writer, much logic and good sense in counsel's position. Our statutes provide for granting a new trial in cases where excessive damages have been awarded by a jury acting under the influence of passion and prej-

<sup>1</sup> See a collection of cases in accord with the principal case in 39 L. R. A. (N. S.), 1064. But compare *Watts v. Watts*, [1905] A. C. 115.

Similarly the defendant may prevent a new trial on the ground that the verdict is too small, by consenting to the entry of a judgment for the proper amount, in cases where the proper amount can be fixed by computation. *Carr v. Miner*, 42 Ill. 179. — Ed.

udice, and contain no exception or saving clause under which the trial court may correct the erroneous conduct of the jury by reducing the verdict. A strict following of the statutes would therefore require a new trial whenever such a verdict is returned. But the practice of correcting the error of the jury by reducing the damages to what the trial court deems reasonable and fair, not only in cases where it is found that the jury was actuated by motives other than passion and prejudice, but in cases where there was no other apparent cause, is too firmly rooted in this state to be now departed from.

Of course, in cases where there is such a degree of passion and prejudice as to make it clear to the court that it permeated the entire case, and influenced the jury upon questions other than damages, such misconduct on the part of the jury (for it amounts to misconduct) will not be overlooked, or any attempt made to correct it by a reduction of damages. In such cases an unconditional new trial will always be granted. But in cases where the trial court, in the exercise of a sound discretion, determines that the passion and prejudice did not influence the jury as to other questions in the case, and that the verdict is right, except that it is excessive, the error of the jury may be corrected by a reduction of the amount of the verdict to such sum as the court deems proper. We are not able to say, from the record before us, that the trial court erred in reducing the verdict in this case, and must sustain the order.

2. We have examined the evidence with care and patience, and conclude that the verdict, as to the other questions, approved as it has been by the trial court, cannot be disturbed.

*Judgment affirmed.*<sup>1</sup>

<sup>1</sup> Compare *Tunnel Mining & Leasing Co. v. Cooper*, 50 Colo. 390, 115 Pac. 901, 39 L. R. A. (N. S.), 1064, Ann. Cas. 1912, C, p. 504; *Lauth v. Chicago Union Traction Co.*, 244 Ill. 244, 91 N. E. 431; *McNamara v. McNamara*, 108 Wis. 613, 84 N. W. 901.

An error of law affecting the entire verdict cannot be cured by a remittitur. *Floody v. Great Northern Ry. Co.*, 102 Minn. 81, 112 N. W. 875, 1081, 13 L. R. A. (N. S.), 1196. — Ed.

GILA VALLEY, GLOBE AND NORTHERN RAILWAY  
COMPANY v. HALL.

SUPREME COURT OF THE UNITED STATES. 1914.

[Reported 232 *United States*, 94.]

PITNEY, J.<sup>1</sup> This is a review of a judgment of the Supreme Court of Arizona, rendered prior to Statehood, affirming the judgment of one of the territorial district courts, in an action brought by Hall against the Railway Company to recover damages for personal injuries. . . .

Upon the trial the jury returned a verdict in his favor for \$10,000. The Company moved for a new trial, and, pending this motion, Hall voluntarily remitted \$5,000 from the amount of the verdict. Thereafter the trial court denied the motion, and entered judgment in Hall's favor for \$5,000 and costs. From this judgment and from the order denying the motion for new trial the Company appealed to the territorial Supreme Court, which affirmed the judgment, as already stated. 13 Arizona, 270.

This writ of error is sued out by the Railway Company and the sureties upon the *supersedeas* bond that was given for the purposes of the appeal to the territorial Supreme Court. A reversal of the judgment is sought because of alleged trial errors. . . .

It is insisted that there was error in entering judgment in favor of the plaintiff for \$5,000, after the residue of the verdict of \$10,000 was remitted pending the motion for new trial. The argument is that the voluntary remission of so large an amount by the plaintiff was an admission that the verdict was excessive; that an excessive verdict may not be cured by a remitter where the amount of the damages cannot be measured by any fixed standard or determined with certainty; that a verdict so excessive is conclusive evidence that it was the product of prejudice on the part of the jury, and that this vice goes to the entire verdict, and not merely to the excess. The practice, however, is recognized by the Civil Code (Ariz. Rev. Stat. 1901, pars. 1450 and 1451), which permit any party in whose favor a verdict or judgment has been rendered to remit any part thereof, after which execution shall issue for the balance only of such judgment. In *Northern Pacific R. R. Co. v. Herbert*, 116 U. S. 642, 646, an action in a territorial court to recover damages for personal injuries that necessitated the amputation of a leg, there was a verdict in favor of the plaintiff for \$25,000,

<sup>1</sup> A part of the opinion is omitted. — Ed.



a motion for a new trial on various grounds, among others that the damages were excessive, and the court ordered that a new trial be granted unless plaintiff remitted \$15,000 of the verdict, and, in case he did so, that the motion should be denied. He remitted the amount, and judgment was entered in his favor for the balance, which the Supreme Court of the Territory affirmed. This court held that the matter was within the discretion of the court; and this even without the sanction of a statute. The constitutional question involved was reëxamined in *Arkansas Cattle Co. v. Mann*, 130 U. S. 69, 73, and the decision in the *Herbert Case* was adhered to, it being held that the practice under criticism did not in any just sense impair the right of trial by jury.

In *Southern Pacific Co. v. Tomlinson*, 4 Arizona, 126, 132, and in *Southern Pacific Co. v. Fitchett*, 9 Arizona, 128, 134, the general practice was sustained by the territorial Supreme Court. In the former case, however, it was said (4 Arizona, 132) that "if it is apparent to the trial court that the verdict was the result of passion or prejudice, a *remittitur* should not be allowed, but the verdict should be set aside. In passing upon this question the court should not look alone to the amount of the damages awarded, but to the whole case." In the *Fitchett Case*, it appearing that the trial court was of the opinion that more than half of the damages awarded for the appellee's injured feelings were excessive, the Supreme Court held that evidently the verdict was not the result of cool and dispassionate consideration, and that the question of the proper sum to be awarded ought not to have been determined by the trial court, but should have been submitted to the determination of another jury. In the present case (13 Arizona, 276) the majority of the court declared they were not prepared to adhere to the views expressed in the *Fitchett Case*: that while there is authority for the position that in no case of unliquidated damages should the court permit a remission where the verdict is excessive, without the consent of the defendant, the great weight of authority supports the practice; citing the decisions of this court already referred to; and declaring that while, if it appears that the verdict is tainted with prejudice or passion, and does not represent the dispassionate judgment of the jury upon the question of the right of the plaintiff to recover, a new trial should be granted, yet the trial court is in a better position to determine this than the appellate court, so that its determination should ordinarily be accepted. We see no ground for disturbing this decision.

*Judgment affirmed.*

## ATCHISON, T. &amp; S. F. RY. CO. v. COGSWELL.

SUPREME COURT OF OKLAHOMA. 1909.

[Reported 23 *Oklahoma*, 181.]

THIS action was brought by Jud Cogswell, plaintiff, against the Atchison, Topeka & Santa Fe Railway Company, defendant, in the United States District Court for the Northern District of the Indian Territory at Bartlesville, for damages sustained on account of personal injuries by him received at defendant's station platform in the town of Bartlesville, caused by the alleged negligence of the railway company. . . .

Defendant in its answer specifically denies all the allegations of the petition. The case was tried to a jury, who returned a verdict for plaintiff, and assessed his damages at \$1,600. On motion for a new trial the court required the plaintiff to elect to accept a judgment for \$1,000 in lieu of the amount fixed by the jury, which plaintiff declined to do. The court then remitted \$600 upon his own motion from the amount fixed by the jury, and rendered judgment in favor of plaintiff for \$1,000. From this judgment defendant appealed to the United States Court of Appeals of the Indian Territory, and plaintiff has filed his cross-appeal, complaining of the court's action in reducing the judgment. The case is now before this court for final disposition under the provisions of the enabling act (Act June 16, 1906, c. 3335, 34 Stat. 267).

HAYES, J.<sup>1</sup> . . . In its motion for a new trial, some of the grounds assigned by plaintiff in error were: "Because said verdict is for excessive damages appearing to have been given under the influence of passion and prejudice"; "because the verdict is not sustained by sufficient evidence"; and "because it is contrary to the evidence." The court upon hearing the motion required the plaintiff to accept a judgment for \$1,000 in lieu of the amount fixed by the jury, which plaintiff declined to do. The court thereupon remitted \$600 from the amount fixed by the jury, overruled plaintiff in error's motion for a new trial, and rendered judgment for the sum of \$1,000. This act of the court is complained of by plaintiff in error in its petition and by defendant in error in his cross-appeal, and was error as to both. The Code in force in the Indian Territory at the time of the trial in this case provided that the court

<sup>1</sup> The statement of facts is abridged and a part of the opinion is omitted.  
— Ed.

may vacate and set aside the verdict of a jury and grant a new trial upon several grounds, among which are the following: "Excessive damages appearing to have been given under the influence of passion or prejudice"; "the verdict or decision is not sustained by sufficient evidence, or is contrary to law." Section 5151, Mansfield's Dig. Ark. As was said by the court in *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. Ed. 110, under this statute, as at common law, the court upon the hearing of a motion for a new trial may in the exercise of its judicial discretion grant or deny a motion for a new trial, or make order that a new trial be granted unless the plaintiff elects to remit the excessive part of the verdict, and, if he does remit, that judgment be entered for the amount of the verdict less the amount remitted. See, also, *Little Rock & Ft. Smith Ry. Co. v. Barker et al.*, 39 Ark. 491; *Northern Pacific Ry. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; *Railway Co. v. Turley*, 1 Ind. Ter. 283, 37 S. W. 52; *Blunt v. Little*, 3 Mason, 102, Fed. Cas. No. 1578. But the trial court is without authority to reduce a verdict and render judgment for the reduced amount without the consent and over the objection of the plaintiff. *Massadillo v. Railway Co.*, 89 Tenn. 661, 15 S. W. 445; *Brown v. McLeish et al.*, 71 Iowa, 381, 32 N. W. 385; *Noel v. Dubuque, Bellevue & Mississippi Ry. Co.*, 44 Iowa, 293; *Young v. Cowden*, 98 Tenn. 577, 40 S. W. 1088. It is therefore apparent that the action of the court in rendering judgment for the reduced amount was error as to the plaintiff, for, when he refused to remit, the court was only authorized to grant a new trial.

Plaintiff in error was also prejudiced by the action of the court; for, when the court decided that the verdict of the jury was excessive, and should be reduced to the amount specified by him in his order, it was entitled to have a new trial if defendant in error refused to remit the amount required by the court, and, while in one sense, it may be said that this act of the court is in favor of plaintiff in error in that its result is to reduce the amount of the judgment against it, it is not, however, the order plaintiff in error was entitled to. . . .

In the case at bar, when the court entered judgment for the lesser sum, if plaintiff in error had not appealed, defendant in error had the right of appeal, and has availed himself of it by his cross-appeal herein, and plaintiff in error would have been compelled to defend against defendant in error's appeal in order to prevent being held for the larger sum on appeal, for which plaintiff now contends in his cross-appeal.

We have examined carefully the evidence in this case and cannot say that the trial court erred in his conclusion that the verdict was excessive. The cause will be reversed and remanded with directions to grant a new trial, and that the cost in this court be taxed equally against the parties.<sup>1</sup>

All the Justices concur.

SAN DIEGO LAND AND TOWN COMPANY v.  
NEALE *et al.*

SUPREME COURT OF CALIFORNIA. 1888.

[Reported 78 *California*, 63.]

HAYNE, C.<sup>2</sup> Proceeding to condemn land for the purposes of a reservoir. It appears from the findings that the use was a public use; that the value of the land to be taken was \$280 per acre, amounting in all to \$98,126; that the damage to the remainder of the tract amounted to \$1,805, and that the value of the improvement was \$300. The plaintiff moved for a new trial as to issue concerning the value of the land sought to be taken, but as to no other issue, and appeals from the order denying the motion.

The defendants make a preliminary objection that a party cannot move for a new trial as to a part of the issues. So far as we are advised, this precise question has not been decided in this state. But upon principle, and according to the analogies of existing rules, we think that the objection is not well taken. There is nothing in the code either expressly forbidding or expressly authorizing such a course. The implication from the language, however, tends to sanction it. The definition of a new trial is as follows: "A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury or court or by referees." Code Civ. Proc., sec. 656. Now, as the law-makers cannot be supposed to have thought that the majority of cases involved only one issue of fact, there is perhaps some implication that they intended that there might be such a thing as a new trial of a single issue, whether there were other issues or not. There is at least no implication

<sup>1</sup> See *Kennon v. Gilmer*, 131 U. S. 22, 33 L. ed. 110, 9 S. Ct. 696; *Brown v. McLeish*, 71 Ia. 381, 32 N. W. 385; *Isley v. Bridge Co.*, 143 N. C. 51, 55 S. E. 416; *Rodgers v. Bailey*, 68 W. Va. 186, 69 S. E. 698. But see *Beach v. Bird & Wells Lumber Co.*, 135 Wis. 550, 116 N. W. 245. — Ed.

<sup>2</sup> Only a part of the opinion of Hayne, C., is given. — Ed.



to the contrary. The analogies of other provisions and previous decisions support the view that there may be a new trial as to a part of the issues. Thus a party may appeal from a part of a judgment or order. See cases collected in note 4 to section 185 of Hayne on New Trial and Appeal. So it has been held that where a party serves his notice of intention to move for a new trial upon only one of two defendants, it is proper to grant a new trial as to the one served, but not as to the other. *Wittenbrock v. Bellmer*, 57 Cal. 12. And it has always been the practice (except in cases of a peculiar character) for any party who is dissatisfied with the result to move for a new trial as to himself, leaving the judgment to stand as to the other parties. And in one sense such a motion is a motion for new trial as to a part of the issues. So it is settled that, upon an appeal from the judgment, the appellate court may order a new trial as to a part of the issues, leaving the decision in force as to the remainder. *Marziou v. Pioche*, 10 Cal. 546; *Jungerman v. Bovee*, 19 Cal. 364; *Kinsey v. Green*, 51 Cal. 379; *LeClert v. Oullahan*, 52 Cal. 253; *Watson v. Cornell*, 52 Cal. 91; *Swift v. Canavan*, 52 Cal. 419; *Billings v. Everett*, 52 Cal. 661; *Phipps v. Harlan*, 53 Cal. 87. And if this can be done, it is difficult to assign a satisfactory reason why the party could not ask the trial court for the same relief in the first instance. The cases which hold that a motion for new trial is premature if made before all the material issues are disposed of are not in conflict with our conclusion, for in the case before us all the material issues were disposed of before the motion was made. We see no inconvenience that can result from the practice. The time to move as to the remaining issues would not be extended by a motion as to a part; and the party would lose his right to attack the findings as to the remaining issues, unless the time should be extended, which could only be for a short period without the consent of the parties. And this being so, the result would simply be the elimination of a part of the controversy, which is not in itself undesirable. The question arose in Nevada upon a similar statute, and the court, after an elaborate examination of the subject, held that a motion for new trial as to a part of the issues was permissible. *Lake v. Bender*, 18 Nev. 361. We are satisfied with the rule laid down in that case. It is possible that there may be cases where the issues are so inseparably blended as to render a separation impracticable. We express no opinion as to that. But it is clear that the present case is not of that character. The preliminary objection should therefore be overruled. . . .

The Court. For the reasons given in the foregoing opinion, the judgment as to all the issues, except the issue as to the value of the land taken, is affirmed; the judgment as to that issue, and the order denying a new trial, are reversed, and the cause remanded for a new trial of said issue, the appellant to recover its costs of appeal.<sup>1</sup>

PARKER *et al.* v. GODIN.

KING'S BENCH. 1729.

[Reported 2 *Strange*, 813.]

SATUR a bankrupt at the time of his going off left some plate with his wife, who in order to raise money upon it delivered to her servant, who went along with the defendant to the door of Mr. Woodward the banker, and there the defendant took the plate into his hands and went into the shop and pawned it in his own name, gave his own note to repay the money, and immediately upon receipt of it went back to the bankrupt's wife, and delivered the money to her. And in trover for the plate the jury (considering the defendant acted only as a friend, and that it would be hard to punish him) found a verdict for the defendant. But upon application to the court a new trial was granted, upon the foot of its being an actual conversion in the defendant, notwithstanding he did not apply the money to his own use. And upon a second trial the plaintiff obtained a verdict for the value of the plate.

N. B. A difficulty arose upon the motion for a new trial, which was this. There were other things besides plate in the declaration, and as to them the verdict *pro def* was right; and yet a new trial must be granted upon the whole. But on consideration the court held that could be no reason to refuse a new trial, for if the merits as to those other things were with defendant, it would be found for him as to them. But it was agreed on all hands, that if one defendant be acquitted, and another found guilty, that defendant can have no new trial. *Strange pro quer*'.

<sup>1</sup> *Simmons v. Fish*, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912, D, p. 588, *accord*.

As to the constitutionality of a statute providing that if a new trial is granted on the ground that the damages are excessive or inadequate, the new trial shall be limited to the question of the amount of damages, see Opinion of the Justices, 207 Mass. 606, 94 N. E. 846. — ED.

In the Matter of the Estate of EVERTS, Deceased. YOUNG  
MEN'S CHRISTIAN ASSOCIATION OF SANTA  
CRUZ *et al.* v. CHAPMAN.

SUPREME COURT OF CALIFORNIA. 1912.

[Reported 163 *California*, 449.]

SHAW, J.<sup>1</sup> Jeanette L. Everts died in Santa Cruz County on January 16, 1911. On January 19, 1911, a petition for the probate of a writing, dated January 13, 1911, purporting to be her will was filed. A will previously executed had given certain legacies to the contestants above mentioned. They appeared and filed a contest of the will of January 13th. The grounds of contest were: 1. That the decedent was of unsound mind when said paper was executed; 2. That it was procured by undue influence; and 3. That it was procured by fraud. The issues were tried by a jury which found that the decedent was of unsound mind as alleged, but that the will was not procured by fraud or undue influence. Thereupon the proponents and contestants moved, separately, for a new trial of the issues decided against them respectively, the proponents asking a new trial of the issue as to insanity, the contestants for a new trial of the issues as to undue influence and fraud. The court granted the motion of the proponents and ordered a new trial of the issue as to insanity and, denying the motion of contestants, refused a new trial of the questions of undue influence and fraud. The contestants appeal separately from each order, the appeal from the order relating to the issue of insanity being case No. 6073, and that from the order upon the issues of undue influence and fraud being case No. 6072.

The granting of a new trial for want of evidence to support the verdict is usually a matter almost entirely within the discretion of the trial court. Such order will not be reversed unless an abuse of discretion appears. *Estate of Motz*, 136 Cal. 560, [69 Pac. 294]; *Bjorman v. Fort B. R. Co.*, 92 Cal. 501, [28 Pac. 591]. The record contains no substantial evidence that the testatrix was of unsound mind or otherwise incompetent to make a will at the time of the execution of the will in question. The court very properly ordered a new trial of that issue.

It is within the power of the trial court, where there is more than one issue of fact in a case and such issues are distinct and

<sup>1</sup> A part of the opinion is omitted. — Ed.

separable in their nature, to order a new trial of one issue and refuse it as to the others. *San Diego L. & T. Co. v. Neal*, 78 Cal. 64, [3 L. R. A. 83, 20 Pac. 372]; *Duff v. Duff*, 101 Cal. 4, [35 Pac. 437]; *Mountain, etc., Co. v. Bryan*, 111 Cal. 38, [43 Pac. 410]. These cases declare also that when such new trial is granted, it opens for examination only the issue upon which it is ordered, that the determination of the other issues remain in the record and that they cannot be retried. The only remedy of the moving party as to those issues is to appeal from the part of the order denying the motion for a new trial as to them. This the appellants have done in this case. If we affirm that part of the order denying the new trial as to fraud and undue influence, the findings on those issues will stand unaffected and the new trial to follow in the lower court must be confined to the question of the unsoundness of mind of the decedent. . . . *The orders appealed from are affirmed.*<sup>1</sup>

ANGELLOTTI, J., and SLOSS, J., concurred.

## BOND v. SPARK, COLEMAN and HUNT.

KING'S BENCH. 1700.

[Reported 12 *Modern*, 275.]

ASSAULT and battery: Issue joined on *son assault demesne*; two were acquitted, and Sparks found guilty; and it was certified by the Judge to be against evidence; and motion for a new trial.

But the Court said, a new trial could not be granted except against all. Whereupon the attorney for the defendants consented for the two defendants who were acquitted, that they should undergo a new trial, and quit the costs which they might have from the plaintiff on their acquittal; and Sparks consented to pay the plaintiff costs.

And so a new trial was granted against all.<sup>2</sup>

<sup>1</sup> *Lisbon v. Lyman*, 49 N. H. 553 (containing an exhaustive opinion by Doe, C. J.), *accord*.

Similarly, when the issues are distinct, the trial court may accept the verdict of the jury on those issues on which they agree, and may order a new trial on the issues on which they disagree. *Marsh v. Isaacs*, 45 L. J. C. P. 505.

It is within the discretion of the trial court to grant a new trial as to all the issues. *Schmidt v. Posner*, 130 Ia. 347, 106 N. W. 760. — Ed.

<sup>2</sup> It is now provided by the Rules of the Supreme Court, 1883, Order XXXIX, rules 6 and 7 (as amended by R. S. C. (Aug.), 1913), that if it appears to the Court of Appeal that the wrong or miscarriage complained of "affects



SPARROW *v.* BROMAGE *et al.*

SUPREME COURT OF ERRORS OF CONNECTICUT. 1910.

[Reported 83 *Connecticut*, 27.]

PRENTICE, J.<sup>1</sup> The plaintiff in his complaint charges the two defendants, of whom Bromage was the chief of police of the town of Enfield, and Moore a patrolman under him, with having unlawfully imprisoned him, and seeks damages from them therefor. A verdict of \$800 was returned against both defendants. They thereupon filed a motion for a new trial, upon the grounds that the verdict was excessive and against the evidence. The motion was granted as to Moore, and the verdict against him set aside. It was denied as to Bromage, and judgment entered against him for the amount of the verdict. Bromage appeals, alleging that the court exceeded its power in taking this action. The sole question presented relates to this contention, which is based upon the propositions that the court in rendering judgment departed from the verdict, and that the appellant was injured by the course pursued, since it could not be said that any judgment, or at least one for so large an amount, would have been rendered against him as a sole defendant.

Where two or more persons unite in an act which constitutes a wrong to another, intending at the time to commit it, or in doing it under circumstances which fairly charge them with intending the consequences which follow, they incur a joint and several liability for the acts of each and all of the joint participants. 1 Cooley on Torts (3d Ed.) 223; *Sheldon v. Kibbe*, 3 Conn. 214, 216; *Ayer v. Ashmead*, 31 id. 447, 453; *Chapin v. Babcock*, 67 id. 255, 256, 34 Atl. 1039; *New Haven Trust Co. v. Doherty*, 74 Conn. 353, 357, 50 Atl. 887. There is no apportionment of responsibility, and no right of contribution or indemnity between them. 1 Cooley on Torts (3d Ed.) 226; *Bailey v. Bussing*, 28 Conn. 455, 457; *Whitaker v. Tatem*, 48 id. 520, 521. One may be sued severally, or any or all together. *Sheldon v. Kibbe*, 3 Conn. 214, 216. Where more than one is sued, a verdict or judgment may be rendered for

part only of the matter in controversy, or some or one only of the parties, the Court of Appeal may give final judgment as to part thereof, or as to some or one only of the parties, and direct a new trial as to the other part only, or as to the other party or parties " and that " a new trial may be ordered on any question without interfering with the finding or decision upon any other question." — Ed.

<sup>1</sup> A part of the opinion is omitted. — Ed.

or against any or all. *Wyeman v. Deady*, 79 Conn. 414, 417, 65 Atl. 129. Where judgment is rendered against more than one, it is in legal effect several as well as joint. The liability continues to be a several one. *Brockett v. Fair Haven & W. R. Co.*, 73 Conn. 428, 431, 47 Atl. 763; *Chapin v. Babcock*, 67 Conn. 255, 256, 34 Atl. 1039. The judgment may be reversed as against one or more and sustained as against others. *Wilford v. Grant, Kirby*, 114.

These well-settled principles as to the nature of the liability of joint tort feors, and the legal effect accorded to legal processes to enforce that liability, lead logically and naturally to the conclusion that, when a verdict is returned against several, the court may deal with it in its further proceedings as it might with verdicts returned against each in separate actions. And so it has been held, although authority to the contrary may be found. 1 Black on Judgments (2d Ed.) § 207; *Hayden v. Woods*, 16 Neb. 306, 20 N. W. 345. Cases involving contract obligations, or concerning independent acts of negligence, of which several have been cited in support of the defendant's proposition, are obviously not in point. To so deal with the verdict and set it aside as to some, and not as to others, is not to depart from it in the rendition of a judgment upon it against those others. Such a judgment pursues it in its legal aspect as a several verdict against each.

But it is said that possible harm might result to those against whom a judgment is thus rendered, for the reason that they might be held charged with responsibility for the acts shown in evidence of those who are allowed to escape from the consequences of the finding of the jury upon the ground that a case had not been made out against them. A situation in which this would be possible would not be the usual one. It could only arise where a failure to satisfactorily establish a claimed joint action by tort feors was a factor in it. In such case, where harm of the kind suggested might be reasonably anticipated if a verdict was permitted to stand against only a part of the defendants unsuccessful before the jury, it is to be presumed that the court would exercise its authority to prevent the injustice, and order a new trial as to all thus threatened with injury. See *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 556, 19 Sup. Ct. Rep. 296. But such a situation is by no possibility present in this case. Whether the facts as claimed to have been established by the plaintiff or by the defendant be accepted, it is beyond question that if the defendant Moore performed any act of detention within the purview of the complaint he performed it under the authority of Bromage, his

superior, and in direct co-operation with the latter. They were inevitably joint actors in so far as Moore acted at all in the perpetration of the wrong of which the plaintiff complains. Such being the case, no harm could possibly accrue to the appellant by the action of the court. If Moore did not participate in the plaintiff's arrest and detention, there was nothing for the appellant to be charged with on Moore's account. If he did participate, then the appellant would be rightfully held responsible for the consequences of his co-actor's acts, and he can be no more injured by Moore's escape, whether right or wrong, from a judgment, than he would have been had Moore not been joined in the action. In this view of the matter, the following cases are not only suggestive, but distinctly pertinent. *Wilford v. Grant*, Kirby, 114; *Harris v. Rosenberg*, 43 Conn. 227, 231. . .

There is no error.<sup>1</sup>

In this opinion the other judges concurred.

### DE VALL *v.* DE VALL.

SUPREME COURT OF OREGON. 1911.

[Reported 60 *Oregon*, 493.]

THIS is an action by Beatrice De Vall against Thomas De Vall to recover judgment for the sum of \$1,008, with interest and costs, upon a decree of the circuit court of the State of Wisconsin. This is the second appeal. For a full statement of the issues, see the same case in 57 Or. 128 (109 Pac. 755).

Upon the second trial had on November 19, 1910, before a jury, verdict was rendered for the defendant, and judgment entered thereon. Thereafter, on the same day, a motion for a new trial was filed by plaintiff upon the following causes: (1) Because the court erred in overruling plaintiff's objection to the reception of any

<sup>1</sup> *Illinois Central R. R. Co. v. Foulks*, 191 Ill. 57, 60 N. E. 890; *Kansas City v. File*, 60 Kan. 157, 55 Pac. 877; *May v. Butterworth*, 106 Mass. 75; *Moreland v. Durocher*, 121 Mich. 398, 80 N. W. 284, *accord.* *Peterson v. Middlesex & Somerset Traction Co.*, 71 N. J. L. 296, 59 Atl. 456 (overruled by *Moersdorf v. N. Y. Telephone Co.*, 84 N. J. L. 747, 87 Atl. 473, decided under the New Jersey Practice Act, 1912, App. A, secs. 72, 73); *Baumberg v. International Ry. Co.*, 121 N. Y. App. Div. 1, 105 N. Y. Supp. 621 (but see *Draper v. Interborough Rapid Transit Co.*, 124 N. Y. App. Div. 357, 108 N. Y. Supp. 691), *contra.* See a note to the principal case in 27 L. R. A. (n. s.), 209. — Ed.

evidence under the answer. (2) Because the court erred in admitting evidence against the objection of plaintiff. (3) Because the court erred in refusing to receive evidence offered by plaintiff upon the trial. (4) Because the verdict was contrary to law. (5) Because the verdict was contrary to the evidence. (6) Because the court erred in refusing to direct a verdict upon the motion of plaintiff to find and bring a verdict for plaintiff.

February 14, 1911, being at the same term of the court, upon consideration of such motion, the court made the following order:

" This cause coming on to be heard this day, on the motion of plaintiff, asking that a judgment heretofore rendered herein to be set aside and a new trial granted, plaintiff appearing by her attorney, Thos. M. Dill, and defendant appearing by his attorney, A. S. Cooley, and the court having carefully considered and weighed all the evidence introduced on the trial of this case, and having considered the entire record herein, including the instructions given to the jurors, and it appearing that, among the instructions given by the court to the jury, was the following, ' Upon the other hand, if the defendant has satisfied you by a preponderance of the evidence that said M. C. Porter was not served with said notice on said 24th day of April, 1907, or that renewal of said notice at the October term of said court was not given to the said Porter, then you should find for the defendant,' and the court believing that said instruction was erroneous, under the evidence introduced on the trial of this case, and that said instruction was prejudicial to plaintiff, therefore, because of the giving of said erroneous instruction as above quoted, and for no other reason or reasons, it is ordered and adjudged that the judgment heretofore rendered in this case be and the same is hereby set aside, and a new trial is hereby granted."

From this order, defendant appealed, under Section 548, L. O. L.

*Affirmed.*

EAKIN, C. J.<sup>1</sup> It thus appears that, although there was a motion to set aside the verdict, the court in its discretion [granted] such motion on the ground of error not assigned in it, and the contention of defendant is that the court had no authority to set aside a verdict upon its own motion, nor upon a ground not assigned in the motion. There is no bill of exception here, and the defendant does not contend that the instruction mentioned in the order was not erroneous. Therefore the only question to be considered is as to the power of the court to set aside a judgment and grant a new trial, either on its own motion, or upon a ground of error not assigned in the motion. Although there seems to be some conflict

<sup>1</sup> A part of the opinion is omitted, together with the opinion of McBride, J., denying a rehearing. — Ed.



of opinion upon this question, the great weight of authority sustains the view that courts of general jurisdiction have inherent power to correct judicial errors for the purpose of promoting impartial administration of justice, and the right of a court to grant a new trial on its own motion is generally recognized. . . .

The order of the court, vacating the judgment and granting a new trial, is affirmed. *Affirmed.*<sup>1</sup>

[Smith, *Action at Law*, 2d ed., pp. 113, 129.]

ANOTHER incident which sometimes occurs during the trial, is the *reservation of a point*. This happens when some point of law is raised, the decision of which affects the fate of the cause, but, as there is no leisure to discuss it thoroughly at *nisi prius*, the judge reserves it for discussion in the ensuing term, and, in such case, the court, before which the point is argued, consider themselves in the same situation as the judge was before whom it was originally raised, and, consequently, have power to order a verdict or a nonsuit to be entered according as their decision on the point may render fit. . . .

A motion to enter a verdict or nonsuit pursuant to leave obtained for that purpose at the trial, is often, indeed, most often, made, concurrently with one for a new trial, in hopes that, if the application fail in one shape, it may prove successful in the other. But there is this difference between the two motions, namely, that the party has a *right* to move for a new trial, and cannot be prevented from so doing; whereas a motion to enter a verdict or a nonsuit never is permitted unless the judge who tried the cause gave the defeated party leave, at the time of the trial, to make such application; for it has been already mentioned, that if a point be raised at *nisi prius*, and *reserved* for the consideration of the court in *banc*, the court, when that point comes to be discussed before it, has power to do whatever the judge who tried the cause ought to have done had he been then advised upon the law of the point so raised before him. And, therefore, if *he* ought to have directed the jury to find a particular verdict, the court will order such a verdict to be

<sup>1</sup> See a note to the principal case in 40 L. R. A. (N. S.), 291.

The rule of the principal case has been changed by statute in some jurisdictions. See *Peirson v. Boston Elevated Ry. Co.*, 191 Mass. 223, 77 N. E. 769; *Loveland v. Rand*, 200 Mass. 142, 85 N. E. 948.

NEW TRIAL AFTER JUDGMENT. As to the power of the trial court to grant a new trial after judgment, see Chapter XI, *infra*. — Ed.

entered. If he ought to have recommended the plaintiff to submit to a nonsuit, the court above will direct a nonsuit. But, if no point have at the time of trial been reserved by the judge, then the court in *banc* has no such authority, and can do no more than refer the case to a fresh jury, by making a rule for a new trial absolute.

In *SOUTH EASTERN RAILWAY COMPANY v. SMITHERMAN* (reported London Times, July 17, 1883, cited Thayer, Preliminary Treatise on Evidence at the Common Law, 241 note), Blackburn, L. J., said:

At common law all trials by jury were before the court *in banc*, as trials at bar now are. The court took the verdict according to what they thought the effect of the findings of the jury before themselves, and gave what they thought the proper judgment. When trials at *nisi prius* were introduced, at first only in the country before Justices of Assize, and, at a much later period, in Middlesex and London, where there were no assizes, before the Chief Justices of the Courts of Queen's Bench and Common Pleas and the Chief Baron, — the verdict was taken by the judge who tried the case at *nisi prius*, according to what he thought the legal effect of the findings, but he could not enter judgment. He returned to the court the verdict, and, on the fourth day of term, the verdict, as he returned it, was entered on the record in what was called the *postea*, and on that the court *in banc* gave judgment. A practice began at least as early as the beginning of the seventeenth century, by which the court *in banc* would entertain a motion, if made within the first four days of term, while the proceedings were, as it was called, in paper only, to stay the *postea*, and if it was made out that there had been any miscarriage at the trial, to set aside the proceedings at *nisi prius* and grant a new trial. But they could do no more. However clearly it appeared that the verdict ought to have been entered for the other party, the court *in banc* could not enter it. The judge who tried the cause at *nisi prius* might by his notes amend the *postea*, but not the court. This defect was partially cured by a practice which grew up, by which the judge, with the consent of the parties, for he could not do it without, reserved leave to move *in banc* to enter the verdict the other way. This practice had, before the Common Law Procedure Act, 1852, become the established law. There was no reason why the motion should not, where leave was reserved, be in the alternative to enter the verdict according to the leave reserved, or to have a new trial,

on the ground either of misdirection of the judge or anything else which amounted to a miscarriage on the trial. One well-recognized head of miscarriage was when the verdict was against the weight of evidence; where, if the court thought that, though the right direction in law was given, the jury had, either from misapprehension or disregard of the direction, or not properly appreciating and considering the evidence, found a verdict so unsatisfactory that it ought not to stand, and that the question should be submitted to another jury, and for that reason granted a new trial. Now, I think, no doubt was ever entertained, at least, I am not aware of any case in which any was expressed, that the court, in considering whether the verdict was satisfactory or not, looked at everything bearing on the conduct of the jury up to the time when the verdict was finally taken. If, by consent of the parties, anything was reserved for the court, that was to be determined by the court; but, whether it was reserved or not, could not prevent the court from considering how the verdict on other points was obtained, and whether it was satisfactory or not. If there had been a bill of exceptions tendered, the court would not entertain a motion for a new trial on any ground which might have been included in it, unless the bill of exceptions was abandoned, but the court would still hear a motion to set aside the verdict as against evidence.<sup>1</sup>

### PROWELL *v.* NEUENDORF.

SUPREME COURT OF MICHIGAN. 1905.

[Reported 141 *Michigan*, 272.]

MONTGOMERY, J. The plaintiff brought an action of ejectment to recover a strip of land claimed by her to be a portion of a lot admittedly owned and occupied by her. Defendants claimed that a line had been established between plaintiff's property and theirs by agreement and acquiescence. The circuit judge submitted this question of fact to the jury, who found for the plaintiff. Later, on a motion for a new trial, the circuit judge set aside the verdict for plaintiff, and without any new trial directed a verdict for defendants and entered judgment thereon. This practice was without precedent and unauthorized. There was no verdict upon which to

<sup>1</sup> See *Casey v. Penn. Asphalt Paving Co.*, 109 Fed. 744; 11 *Encyc. of Pl. & Pr.* 921.

base the judgment. See *Central Sav. Bank v. O'Connor*, 132 Mich. 581; *Plunkett v. Railway Co.*, 140 Mich. 299.

The judgment will be set aside, and a new trial ordered. Plaintiff will recover costs of this court.

MOORE, C. J., and CARPENTER, GRANT, and OSTRANDER, JJ., concurred.

THE DOWAGIAC MANUFACTURING COMPANY  
v. SCHROEDER.

SUPREME COURT OF WISCONSIN. 1900.

[Reported 108 *Wisconsin*, 109.]

APPEAL from a judgment of the circuit court for Brown county:  
S. D. HASTINGS, Jr., Circuit Judge. *Affirmed.*

This is an action for the recovery of the purchase price of two grain drills sold by the plaintiff to the defendant by a written contract of sale. The defense relied upon was that the defendant was induced to sign the contract by fraudulent representations as to its contents. The plaintiff's evidence showed the execution of the contract by both parties, the delivery of the drills as provided for by the terms of the contract, and the fact of nonpayment. The defendant's evidence concerning the alleged fraud in the procuring of the contract will be found sufficiently stated in the opinion. The jury returned a verdict for the defendant, but the court, on motion, set the same aside and entered judgment for the plaintiff for the purchase price of the drills, for the reason that no defense had been proven; and from this judgment the defendant appeals.

WINSLOW, J. It was shown that the defendant purchased the grain drills in question by a written contract, and the only defense attempted to be made, or which the evidence tends to establish, was that the defendant was induced to sign the contract of purchase by means of fraudulent representations made by the plaintiff's agent as to the contents of the contract.

The principle of law is that, if it be clearly and satisfactorily proven that a party signed a note or contract relying upon false and fraudulent representations as to its true character, and was guilty of no negligence in failing to ascertain what the contract really was, he is not bound by it. *Bowers v. Thomas*, 62 Wis. 480, and cases cited.



The evidence in the case before us entirely fails to meet this test. The defendant was a German of considerable business experience. He had been in the business of selling farm machinery fourteen years. He claims he could not read English, but admits on cross-examination that he could read enough to tell what the meaning of the contract was; and the proof was overwhelming, by his own admissions, that he could read business papers. He could write his name reasonably well, and admits making out notes for others to sign. He had been a school director in his district, and signed orders and teachers' contracts. His son, who acted as his book-keeper, was present when the contract was signed, but was not called as a witness. This son was twenty-two years of age, and had a good education; but neither the father nor the son read or tried to read the contract, though the defendant admits that there was nothing to prevent it. Under these circumstances there was clear neglect in signing the contract without ascertaining its contents.

The plaintiff's right of recovery was clear upon the undisputed evidence; hence the trial court had power, upon setting aside the erroneous verdict, to render judgment in accordance with such undisputed evidence. *Gammon v. Abrams*, 53 Wis. 323; *J. & H. Clasgens Co. v. Silber*, 87 Wis. 357; *Calteaux v. Mueller*, 102 Wis. 525.

By the court:

*Judgment affirmed.*<sup>1</sup>

## HESS v. GREAT NORTHERN RAILWAY COMPANY.

SUPREME COURT OF MINNESOTA. 1906.

[Reported 98 *Minnesota*, 198.]

ACTION in the district court for Ramsey county to recover \$20,000 for personal injuries. The case was tried before Orr, J., and a jury, which rendered a verdict in favor of plaintiff for \$4,000. From an order denying a motion for judgment notwithstanding the verdict, and granting a motion for a new trial, the parties severally appealed. Affirmed upon both appeals. Clerk's taxation of costs reversed.<sup>2</sup>

BROWN, J. Action for personal injuries, in which, after verdict for plaintiff, defendant moved in the alternative for judgment notwithstanding the verdict or for a new trial. The court denied

<sup>1</sup> Compare *Muench v. Heinemann*, 119 Wis. 441, 96 N. W. 800. — Ed.

<sup>2</sup> A part of the opinion, relating to the taxation of costs, is omitted. — Ed.

the motion for judgment, but granted a new trial. Defendant appealed from so much of the order as denied its motion for judgment, and plaintiff appealed from the part granting a new trial.

The facts, briefly stated, are as follows: Plaintiff, in November, 1903, chartered a car in which to transport certain household goods and farming utensils belonging to him from Freeborn county, in this state, to Hunter, in the state of North Dakota, where he had rented a farm which he intended to operate during the following year. He accompanied the car on its journey, and occupied the position of a passenger, though he rode in the car containing his goods. At Campbell, in this state, on November 27, a collision between the train to which his car was attached and another on defendant's road resulted in wrecking several cars, and, as claimed, seriously injuring plaintiff. The defense to the action was (1) that plaintiff in fact received no serious injury, and (2) that subsequent to the accident, on December 10, 1903, defendant settled and paid plaintiff in full for all injuries sustained to his person, and that plaintiff executed and delivered to it a written release and discharge of all claims for such injuries. The release was set out *in hæc verba* in defendant's answer, to which plaintiff replied that the same was obtained by fraudulent representations on the part of the agent of defendant to the effect that it was a release and discharge of plaintiff's claim for damage to his personal property only. The principal question litigated on the trial, aside from the nature and extent of plaintiff's injuries, was this issue of fraud. The jury found in plaintiff's favor, and the question presented to this court is whether, within the rule governing the right of a party to judgment notwithstanding a verdict, the evidence is so far conclusive that no fraud was perpetrated by defendant's agent in making the settlement that the court below should have granted defendant's motion.

1. The correct rule on this subject was laid down in the case of Cruikshank v. St. Paul F. & M. Ins. Co., 75 Minn. 266, 77 N. W. 958, where it was held, in effect, that such relief was not proper in any case where the evidence offered, if true, constitutes a cause of action or a defense. Such relief is never granted where there is a clear conflict in the evidence. Marquardt v. Hubner, 77 Minn. 442, 80 N. W. 617; Kreatz v. St. Cloud School District, 79 Minn. 14, 81 N. W. 533; Bragg v. Chicago, M. & St. P. Ry. Co., 81 Minn. 130, 83 N. W. 511; Levine v. Barrett & Barrett, 83 Minn. 145, 85 N. W. 942, 87 N. W. 847; Fischer v. Sperl, 94 Minn. 421, 103 N. W. 502.

The evidence introduced by defendant tends strongly to show that the settlement, made with plaintiff at Hunter, North Dakota, by an agent of defendant, was intended to cover all damages for injuries to his person, and the written release expressly so states. On the other hand, the evidence offered by plaintiff is direct and positive that the settlement had reference solely to the damage and injury to his personal property. Plaintiff distinctly testified that the subject-matter of his personal injuries was not referred to at the time of the settlement, except that defendant's agent stated that his claim in that respect could be settled later. That the settlement was limited to plaintiff's personal effects was testified to by another witness, plaintiff's niece, who was present at the time. Her testimony was substantially in accord with that given by plaintiff. Plaintiff signed the written document evidencing the settlement, which refers solely to his personal injuries; but he testified that by reason of his injuries he was unable to read the same, that it appeared blurred to his vision, that the agent read it to him, and that he signed it in reliance upon his statement that it had reference to his personal property. In this state of the evidence the court was not authorized to grant judgment notwithstanding the verdict.<sup>1</sup>

2. The only point made on plaintiff's appeal from the order granting a new trial is that it does not expressly appear therefrom that it was granted on the ground that the verdict was not sustained by the evidence and, as the record presents no errors in law to justify a new trial, the order should be reversed and the verdict reinstated, under the rule in *Berg v. Olson*, 88 Minn. 392, 93 N. W. 309, *Fitger v. Guthrie*, 89 Minn. 330, 94 N. W. 888, and *Owens v. Savage*, 93 Minn. 468, 101 N. W. 790. Our examination of the

<sup>1</sup> By Minn. Laws 1895, c. 320, it is provided that: "In all cases where at the close of the testimony in the case tried a motion is made by either party to the suit requesting the trial court to direct a verdict in favor of the party making such motion, which motion was denied, the trial court on motion made that judgment be entered notwithstanding the verdict, or on motion for a new trial, shall order judgment to be entered in favor of the party who was entitled to have a verdict directed in his or its favor; and the supreme court of the state on appeal from an order granting or denying a motion for a new trial in the action in which such motion was made may order and direct judgment to be entered in favor of the party who was entitled to have such verdict decided in his or its favor whenever it shall appear from the testimony that the party was entitled to have such motion granted." See also Laws 1913, c. 245 (Minn. Gen. Stats., sec. 7998).

This statute is constitutional. See *Kernan v. St. Paul City Ry. Co.*, 64 Minn. 312, 67 N. W. 71. — Ed.

memorandum attached to the order appealed from leads to the conclusion that it was in fact based upon the ground that the verdict was not sustained by the evidence, and, although it is not expressly and in so many words so stated, yet it is sufficiently so indicated. It was therefore a discretionary order, within the rule of *Hicks v. Stone*, 13 Minn. 398 (434).

The order of the court below is affirmed on both appeals.<sup>1</sup>

(*Form of Notice of Motion for New Trial.*)<sup>2</sup>

IN the ..... Court of the County of ....., State of .....  
 A. B., plaintiff, }  
                   against  
 C. D., defendant. }

Please take notice that on the affidavits of P. Q. and R. S. copies of which are hereto annexed, the undersigned will on the.....day of....., 19....., at the hour of.....o'clock A.M. of the said day, or as soon thereafter as counsel can be heard, at the court-house in the city of.....in the said county, move the court for an order setting aside the verdict herein, rendered on the.....day of....., 19....., and granting a new trial herein, on the grounds of misconduct of M. N., one of the jurors who rendered the afore-said verdict.

Dated, .....

X. Y., Attorney for Defendant.  
 (Address.)

To V. W., Attorney for Plaintiff.

<sup>1</sup> See *Dalmas v. Kemble*, 215 Pa. 410, 64 Atl. 559 (decided under a statute, Act of April 22, 1905, P. L. 286, similar to the Minnesota statute). Compare *Bothwell v. Boston Elevated Ry. Co.*, 215 Mass. 467, *supra*, p. 341; *Pattison v. Livingston Amusement Co.*, 156 N. Y. App. Div. 368, 141 N. Y. Supp. 588.

The Federal courts are precluded by the Seventh Amendment to the Constitution of the United States from applying this practice. See *Slocum v. N. Y. Life Ins. Co.*, 228 U. S. 364, 57 L. ed. 879, 33 S. Ct. 523; *Young v. Central R. R. Co. of N. J.*, 232 U. S. 602, *supra*, p. 340. See an article by J. L. Thorndike, Esq., on "Trial by Jury in the United States Courts," in 26 Harv. L. Rev. 732; and an article by Professor Henry Schofield on "New Trials and the Seventh Amendment," in 8 Ill. L. Rev. 287, 351, 465. And see Reports of the Amer. Bar Assoc., Vol. XXXVIII (1913), 561. — Ed.

<sup>2</sup> As to the necessity of notice of motion, see 14 Encyc. of Pl. and Pr. 895. — Ed.



## CHAPTER IX.

### MOTIONS BASED ON THE PLEADINGS.

#### SECTION I.

##### *Motion in Arrest of Judgment.*

#### PELICAN ASSURANCE COMPANY *v.* AMERICAN FEED & GROCERY COMPANY *et al.*

SUPREME COURT OF TENNESSEE. 1909.

[Reported 122 *Tennessee*, 652.]

BEARD, C. J. The question here involved is the same that was considered and disposed of in *Hall v. State*, 110 Tenn., 366, 75 S. W., 716. In that case, as in this, the minute entry was that the defendant moved "the court in arrest of judgment and for a new trial"; and it was there held that, whether the motion was single, "embracing two distinct, if not incongruous, matters of procedure," or the entry was construed as the "equivalent of a recital of the two motions," yet the necessary inference would be "that the motion in arrest was first made, and . . . was disposed of first." In this condition of the record, the court applied the rule that the making of motion in arrest prior to the motion for a new trial was a waiver of the latter motion, and the legal effect of this waiver was that the court on appeal was "confined to error assigned on the face of the record."<sup>1</sup>

In the case at bar errors are assigned upon the action of the trial judge in admitting over objection incompetent testimony, in overruling a motion for peremptory instruction, in giving certain instructions to the jury, and failing to grant requests that were submitted. It will be observed that these errors, if committed, occurred in the trial of the cause, and would have constituted grounds of a motion for a new trial, made in the court below, to the

<sup>1</sup> *Kelley v. Bell*, 172 Ind. 590, 88 N. E. 58, *accord*. *Gerling v. Agricultural Ins. Co.*, 39 W. Va. 689, 20 S. E. 691 (where the motions were made simultaneously as in the principal case). *Jewell v. Blandford*, 7 Dana (Ky.), 472 (where the motion for a new trial was made subsequently to the motion in arrest), *contra*. See *Williams v. State*, 121 Ga. 579, 49 S. E. 689. See 2 *Tidd, Practice*, 9th ed., 913. — Ed.

end that a retrial might be obtained, or, failing in this, then to preserve the same in the record, so that the ruling of the trial judge in declining the motion might be preserved to the plaintiff in error. *Railroad v. Johnson*, 114 Tenn., 633, 88 S. W., 169. Resting upon matters extrinsic to the technical record, they could only be preserved for review in this court by a properly filed bill of exceptions. If, as is contended by counsel for plaintiff in error, they can here be made the subject of investigation, by reason of the motion in arrest having been overruled, then we can see no distinction between that and a motion for new trial; for the very errors that are now made the subject of complaint are those which would have been properly raised on this latter motion. It is apparent that, to secure a reversal on account of these errors, it would be necessary to look beyond the "face of the record" into the evidence introduced. This cannot be done. It is well settled by the authorities that a motion in arrest of judgment lies alone for some error which vitiates the proceeding, or is of so serious a character that judgment should not be rendered. It "can only be maintained for a defect upon the face of the record, and the evidence is no part of the record for this purpose." *Bond v. Dustin*, 112 U. S., 604, 5 Sup. Ct., 296, 28 L. Ed., 835; *Van Stone v. Stillwell E. T. C. Co.*, 142 U. S., 128, 12 Sup. Ct., 181, 35 L. Ed., 961; 23 Cyc., 825.

Applying this rule of correct procedure to the present case, it follows that the judgment must be affirmed.<sup>1</sup>

# BAKER *et al.* *v.* SHERMAN & MILLER.

SUPREME COURT OF VERMONT. 1901.

[Reported 73 *Vermont*, 26.]

ROWELL, J.<sup>2</sup> This is an action on the case for deceit in the sale of land. Plea the general issue and trial by jury. Verdict and judgment for the plaintiffs.

The declaration originally contained but one count, which alleges that the defendants "sold and conveyed to the plaintiffs their

<sup>1</sup> Nor on such a motion can advantage be taken of insufficiency of the evidence, *Bond v. Dustin*, 112 U. S. 604, 28 L. ed. 835, 5 S. Ct. 296; *State v. Young*, 153 Ia. 4, 132 N. W. 813, Ann. Cas. 1913 E, p. 70; *Hubbard v. Rutland R. R. Co.*, 80 Vt. 462, 68 Atl. 647; nor of a variance, *Jacobs v. Marks*, 183 Ill. 533, 56 N. E. 154, affirmed 182 U. S. 583, 45 L. ed. 1241, 21 S. Ct. 865. — ED.

<sup>2</sup> A part of the opinion is omitted. — ED.

interest in " 1305 acres of timber land at such a price. The fraud alleged is, the knowingly false representation that the entire tract was situated within a natural basin, and bounded on the east, south, and west by the crest of a certain range of mountains, and that the entire tract situated within said basin and bounds was comprised within said tract of 1305 acres, whereas 200 acres of said last-mentioned tract lay beyond the crest of said range, and 75 acres lying within said basin did not belong to the defendants and was not a part of the tract conveyed.

The new count alleges that the defendants sold and conveyed to the plaintiffs " their interest in " that portion of lot 4 in range 6 in Jay that lies west of the crest of said range, which runs across it, at such another price, and fraudulently represented that said portion contained 55 acres, whereas it contained only about 20 acres.

Neither count alleges that the defendants or either of them had or claimed to have any interest in said land or any part thereof, by possession, color, or otherwise howsoever, nor that the plaintiffs or either of them were induced to believe or did believe that they had. . . .

The defendants moved in arrest of judgment, for that the declaration does not allege that the defendants or either of them, at the time of the alleged sale and conveyance, or ever, had or owned any right, title, or interest in or to the whole or any part of the land mentioned in the declaration, and that therefore it does not appear thereby that the plaintiffs have suffered any damage.

The plaintiffs claim that the testimony incorporated into the bill of exceptions is a part of the record, and can be looked into on this motion, and that that shows that the defendants did have an interest in the land. But nothing is better settled than that the testimony is not a part of the record for this purpose, and that on a motion in arrest for insufficiency of the declaration, only the declaration itself, and the subsequent pleadings that may, and sometimes do, help it out, can be looked into. *Harding v. Cragie*, 8 Vt. 501, 508. The law of the subject is, that if the declaration omits to allege any fact essential to a right of action, and it is not implied in nor inferable from the finding of those that are alleged, a verdict for the plaintiff does not cure the defect. Thus, in *assumpsit*, no consideration alleged and verdict for the plaintiff; judgment must be arrested, for finding that defendant promised does not imply a finding of consideration for the promise. So here, finding that the defendants deceived the plaintiffs as alleged, furnishes

no legal intendment that the defendants had an interest in the land, nor that the plaintiffs were damaged by the deceit, for they could not have been damaged by it unless the defendants had an interest, which is not alleged nor implied from the finding of anything that is alleged. The allegation is that the defendants sold and conveyed to the plaintiffs "their interest" in the land, not the land itself. It is said that this allegation is sufficient, for when one sells land to another, ownership is implied and need not be alleged, and that so are the precedents for deceit in the sale of both real and personal estate. But they are so only when the thing itself is sold, not when only the right, title, and interest therein is sold, for in such case, neither in pleading nor elsewhere, does the law imply ownership in land nor in chattels; not in chattels, as shown by *Sherman v. Champlain Transportation Co.*, 31 Vt. 162, 175, and a note in 62 Am. Dec. 463; not in land, as shown by *Cummings v. Dearborn*, 56 Vt. 441. That was an action on covenants of title and warranty in a quitclaim deed; and it was held that the covenants did not enlarge the grant, but were only co-extensive with it, and that if the grantor had no interest in the land, the covenants were of no value. Nor do such covenants in such a deed estop the grantor from asserting an after-acquired title. *Hanrick v. Patrick*, 119 U. S. 156, 175.

So the allegation here amounts to no more than that the defendants quitclaimed their interest to the plaintiffs, which implies no title nor claim of title, but means only that the defendants conveyed their interest, whatever it was; and in such a case, in the absence of an allegation of fraudulent representations as to title, *caveat emptor* applies. 8 Am. & Eng. Ency. Law, 2d ed. 53.

It follows, therefore, that the motion in arrest must prevail, unless the plaintiffs are allowed to avoid it by amendment, which they ask leave to do, on the authority of *Chaffee v. The Rutland R. R. Co.*, 71 Vt. 384; for they say that the testimony incorporated into the exceptions shows that the defendants' ownership was proved. An amendment of this kind at this stage of a case should be allowed only when it is clear that the matter was an issue on trial, and as fully litigated as though it had been raised by the pleadings; for otherwise great injustice might be done to the defendant by being cast on an issue that he had no notice of and did not come prepared to try.

Now although there was testimony on both sides tending to show claim and representation of ownership by the defendants, yet it came in in connection with, and as a part of, testimony that



was directed to the issues made by the pleadings, and does not appear to have been taken note of by either side as raising an issue as to claim and representation of title, which was a matter dehors the pleadings. In *Chaffee v. The Railroad Company*, it was apparent from the exceptions that the question was fully litigated, and that the amendment would present no new issue nor require any different proof. That cannot be said in this case, and therefore leave to amend in order to avoid the motion is denied.<sup>1</sup>

CHAFFEE *et al.* v. RUTLAND RAILROAD COMPANY.

SUPREME COURT OF VERMONT. 1899.

[Reported 71 *Vermont*, 384.]

TAFT, C. J. This action is brought to recover damages for the destruction of the plaintiffs' property by fire communicated by the defendant's engine. It is alleged in the declaration that the defendant so carelessly, negligently and imprudently managed its engine, that the plaintiffs' property was destroyed by fire communicated therefrom. There is no allegation that the defendant's engine was not properly equipped with suitable spark arresters and ash-pans, nor that the defendant permitted dry grass, weeds, etc. to accumulate on its road-bed. The defendant objected to the proof of such facts, that is, that the engine was not equipped with suitable spark arresters and ash-pans and the accumulation of dry grass and weeds on its road-bed, and also to the charge, that if such facts were established, the plaintiffs had a right to recover.

The members of the court are not agreed in respect to the case as shown by the record but concur in holding that if the declaration had contained the allegations of negligence in the construction or condition of the engine in the respects named, and in the accumulation of dry grass and weeds, there was no error in the admission of the testimony nor in the charge of the court. The question arises whether this court will permit such an amendment to be now made after judgment. The cause was fully tried as though such alle-

<sup>1</sup> The court at the next term granted a *venire de novo* on terms as to the payment of costs by the plaintiffs and directed that if a new trial was not wanted on those terms, judgment on the verdict should be arrested. As to this, see *infra*, p. 514.

Compare *Rushton v. Aspinall*, 2 Doug. 679; *Reed v. Browning*, 130 Ind. 575, 30 N. E. 704; *Southern Ry. Co. v. Maxwell*, 113 Tenn. 464, 82 S. W. 1137. See Gould, Pleading, Hamilton's ed., 472. — Ed.

gations were in the declaration. It is expressly stated in the exceptions that both parties gave testimony pro and con upon the questions of the defective spark arrester and ash-pan, and the accumulation of dry grass and weeds. Such testimony was admissible upon the question of whether the first was communicated to the plaintiffs' property by the defendant's engine. It is apparent from the exceptions that the questions were fully litigated. The course of the trial was the same as if the allegations had not been omitted and an amendment of the declaration will present no new issue nor require any different proof. V. S. 1148 authorizes a court at any time to permit either of the parties to amend a defect in the pleadings upon such conditions as the court prescribes. In *Bates v. Cilley*, 47 Vt. 1, an amendment was permitted after verdict and before judgment and also in *Kimball v. Ladd*, 42 Vt. 747, and see many cases therein cited. At common law the court had power to allow an amendment of the pleadings in any case until final judgment and after motion in arrest of judgment. Amendments after trial are allowed in order to conform the pleading to the facts proved.

None of our cases go to the extent of permitting an amendment after judgment but the court under the statute V. S. 1148, clearly have that power. All amendments are in the discretion of the court and are allowed or refused as the court may deem most conducive, to the furtherance of justice. An amendment is not allowed if it introduces a new cause of action. An amendment in the case before us is only permitted in order that the pleadings may conform to the proof and for the purpose of sustaining the judgment, not reversing it. 1 Ency. Pl. and Prac. 582. For as said by Redfield, C. J., in *Bank v. Downer*, 29 Vt. 332, "an amendment will cure error but cannot create it."

The plaintiffs may amend their declaration by filing an amendment alleging the defendant's negligence in the construction or condition of the spark arrester and ash-pan of its engine, and in permitting an accumulation upon its road-bed, of dry grass, weeds, bushes, etc., and when such amendment is made the,

*Judgment may be affirmed, but without costs in this court.*

THE CHICAGO AND ALTON RAILROAD COMPANY  
v. CLAUSEN.

SUPREME COURT OF ILLINOIS. 1898.

[Reported 173 *Illinois*, 100.]

CARTWRIGHT, J.<sup>1</sup> Appellee brought this suit against appellant to recover damages for injuries alleged to have been sustained by the starting of a train on which he was a passenger, while he was attempting to get off at appellant's station at Gardner, Illinois. There was a judgment for appellee, which has been affirmed by the Appellate Court.

It is argued at much length that the trial court improperly overruled a demurrer to the first original count and five amended counts of the declaration upon which the case finally went to trial. No error has been assigned upon such ruling on the demurrer, either in the Appellate Court or this court, and none could be so assigned, for the reason that after the demurrer was overruled the defendant pleaded the general issue and thereby raised an issue of fact, which was tried. It has always been the rule in this State that if a party wishes to have the action of a court in overruling his demurrer reviewed in this court he must abide by the demurrer. By pleading over he waives the demurrer and the right to assign error upon the ruling. *Lincoln v. Cook*, 2 Seam. 61; *Wann v. McGoon*, id. 74; *Nye v. Wright*, id. 222; *Dickhut v. Durrell*, 11 Ill. 72; *Walker v. Welch*, 14 id. 277; *American Express Co. v. Pinckney*, 29 id. 392; *Gardner v. Haynie*, 42 id. 291; *Ambler v. Whipple*, 139 id. 311; *Dunlap v. Chicago, Milwaukee and St. Paul Railway Co.*, 151 id. 409; *Grier v. Gibson*, 36 id. 521; *Hull v. Johnston*, 90 id. 604.

Defendant made a motion in arrest of judgment, which was overruled, and that is assigned for error; but having once had the judgment of the court on its demurrer it could not again invoke it for the same reasons by motion in arrest. After a judgment overruling a demurrer to a declaration there can be no motion in arrest of judgment on account of any exception to the declaration that might have been taken on the argument of the demurrer. *Rouse v. County of Peoria*, 2 Gilm. 99; *Quiney Coal Co. v. Hood*, 7 Ill. 68; *American Express Co. v. Pinckney*, *supra*; *Independent Order of Mutual Aid v. Paine*, 122 Ill. 625.<sup>2</sup>

<sup>1</sup> A part of the opinion is omitted. — Ed.

<sup>2</sup> See *Edwards v. Blunt*, 4 Strange, 425, in which the following opinion was given: "*Per curiam*. After judgment on demurrer, the defendant shall not

While the defendant, by pleading over, waived its demurrer and the right to assign error upon the ruling of the court on the demurrer, it did not waive innate and substantial defects in the declaration which would render the declaration insufficient to sustain a judgment, and the question whether it is so far defective may be considered under the assignments of error. The question which may be thus presented is not as broad as those questions which may be raised by demurrer, for the reason that defects in pleading may sometimes be aided by the pleadings of the opposite party, or be cured by the Statute of Amendments and Jeofails, or by intendment after verdict. The objections made to the various counts of the declaration are, that the statements therein are too general and indefinite in failing to show how the starting of the train operated to throw plaintiff from it and in what manner it was started, and that the various counts allege certain duties on the part of the defendant, and charge the neglect and violation of other duties, and the doing of other acts foreign to the duties so alleged, as the cause of the supposed injuries. So far as the declaration is defective in the respects complained of, the defendant's plea of the general issue, of course, could not aid or supply any omission or informality therein. It is also true that the Statute of Amendments and Jeofails does not extend to cure defects which are clearly matters of substance. It provides that judgment shall not be reversed for want of any allegation or averment on account of which omission a special demurrer could have been maintained, but it does not protect a judgment by default against objections for matter of substance. Many such objections, however, have

come to arrest the judgment on return of the inquiry, for an exception that might have been taken on arguing the demurrer. The parties cannot be said to come as *amici cur'*, nor shall any body tell us that the judgment we gave on mature deliberation is wrong; it is otherwise indeed in the case of judgment by default, for that is not given in so solemn a manner; or if the fault arises on the writ of inquiry or verdict, for there the party could not allege it before. *How v. Godfrey*, Mich. 4 Geo. 2.' And see *White's Admr. v. Central Vermont Ry. Co.*, 87 Vt. 330, 89 Atl. 618.

But see *Stewart v. Terre Haute, etc., R. R. Co.*, 103 Ind. 44, 2 N. E. 208, in which the opposite view is taken. See also *Field v. Slaughter*, 1 Bibb (Ky.), 160, where it was held that the court, having improperly overruled the defendant's demurrer to the plaintiff's replication, properly sustained a motion in arrest of judgment.

The defendant's failure to demur or his interposing a demurrer on other grounds of objection does not preclude him from relying on a particular objection on a motion in arrest of judgment. *Southern Ry. Co. v. Maxwell*, 113 Tenn. 464, 82 S. W. 1137. — Ed.



always been cured, at the common law, by a verdict. At the common law, independently of any statute, the rule was and is "that where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict." 1 Chitty's Pl. 763. This rule was quoted and approved in *Keegan v. Kinnare*, 123 Ill. 280, and *Chicago and Eastern Illinois Railroad Co. v. Hines*, 132 id. 161. The intendment in such case arises from the joint effect of the verdict and the issue upon which it was given, and if the declaration contains terms sufficiently general to comprehend, by fair and reasonable intendment, any matter necessary to be proved, and without proof of which the jury could not have given the verdict, the want of an express statement of it in the declaration is cured by the verdict. Under this rule a verdict will aid a defective statement of a cause of action, but will never assist a statement of a defective cause of action. 1 Chitty's Pl. 681. Where the declaration and the issue joined upon it do not fairly impose the duty on the plaintiff to prove the omitted fact, the omission will not be cured, *Joliet Steel Co. v. Shields*, 134 Ill. 209, and if, with all the intendments in its favor, the declaration is so defective that it will not sustain a judgment, such defects may be taken advantage of on error. *Wilson v. Myrick*, 26 Ill. 34; *Schofield v. Settley*, 31 id. 515; *Chicago and Eastern Illinois Railroad Co. v. Hines*, *supra*; *Culver v. Third Nat. Bank*, 64 Ill. 528. The rule was applied in *Haynes v. Lucas*, 50 Ill. 436, and the judgment was reversed. That was an action in debt on a contract for the sale of land, and a plea of *nil debet*, which was bad, had been filed, but it was said that if the plea had been good the defect would be ground of error. So in *Kipp v. Lichtenstein*, 79 Ill. 358, the declaration was so defective that it would not sustain a judgment, and it was held that the objection might be taken on error. That was an action of debt on a supposed statutory liability, and the statute had been repealed. It was held sufficient ground for the reversal that the declaration showed no cause of action. In *People v. City of Spring Valley*, 129 Ill. 169, there was an information under which the judgment would be one of ouster against the corporation for not having been legally organized, and the information admitted that it was legally

organized. The information was held so defective that it could not support a judgment, and it was said that such defect might be availed of on error even after a demurrer to a declaration had been overruled and the defendant had pleaded over. Such an objection is not waived by pleading, and a party who has no cause of action cannot sustain a judgment in his favor.

When these rules are applied to the declaration in this case, we are satisfied that, although not very well drawn, it is clearly sufficient to sustain the judgment. So far as its allegations that it became and was the duty of the defendant to do certain things are concerned, they are mere conclusions of law, which are not traversable. It is not sufficient in a declaration to allege that it is the duty of the defendant to do certain things, but the declaration must state facts from which the law will raise the duty. *Ayers v. City of Chicago*, 111 Ill. 406. The relative rights and obligations of plaintiff and defendant, as passenger and carrier, are matters of law, and the objection that the duty alleged as a conclusion of law does not harmonize with the fact averred as a breach of the duty does not render the declaration insufficient to sustain the judgment, if it contains facts sufficient to raise the duty of which a breach is alleged. It is averred that the plaintiff became a passenger on the passenger train of defendant at Dwight, to be carried from that place to Gardner, and that while he, with due care, caution and diligence, was about to alight from the train at Gardner, the defendant carelessly and negligently caused the train to be violently and suddenly moved forward, and thereby he was thrown from and off the train to and upon the wooden platform of defendant and thereby injured; and in different counts it was alleged that defendant did not stop the train at Gardner a sufficient length of time to receive and let off passengers, but suddenly started the train, whereby plaintiff, who was attempting to alight, was thrown off and injured. Under the issue joined the declaration was sufficient after verdict. . . .

*Judgment affirmed.*

BRUCE *v.* BEALL.

SUPREME COURT OF TENNESSEE. 1898.

[Reported 100 *Tennessee*, 573.]

THE plaintiff was an employé of the defendants, and while engaged in the performance of a duty to his employers was injured by the fall of a freight and passenger elevator in the storehouse of the defendants.

In his declaration, the plaintiff alleged that the elevator was "so carelessly and negligently constructed and maintained, that the cables suspending it had been thirteen years in use, and were old and rusted, and that the wooden guides attached were so worn and rotten, and the safety appliance, intended to prevent a fall, was so defective and out of repair," that while the plaintiff was riding on it, and discharging a duty in obedience to the orders of his employers, the cables, together with the safety catches and other appliances, broke, and the elevator fell a distance of five stories to the basement floor beneath, carrying plaintiff with it, and inflicting the injuries complained of.

It was further alleged that these injuries resulted from the flagrant negligence of the defendants in the construction and maintenance of the elevator and its appliances. To this declaration, a number of pleas were put in, among them being that of not guilty.

There was a verdict of \$12,000 for the plaintiff.<sup>1</sup>

BEARD, J. . . . It is said the trial Court was in error in overruling the motion of defendant below in arrest of judgment. This motion was rested on the ground that the declaration did not aver that the plaintiff did not know, nor by the exercise of reasonable care could have known, of the defects in the elevator which are alleged to have produced the injuries, nor did it aver that the defendant below had superior knowledge, or means of knowledge, of such defects.

It may be conceded that this was a lack in the declaration, which would have been fatal on motion in arrest, save for the pleas of the defendant, which put distinctly in issue the knowledge, or want of knowledge, of the plaintiff, as well as that of defendant, and thus fully supplied the defects of the declaration. This is a sufficient answer to this motion.

Where a declaration lying in debt is defective if the defendant answers over (without demurrer or motion), tendering an issue of

<sup>1</sup> A part of the opinion is omitted and the statement of facts is taken from a former opinion in the same case (99 *Tenn.* 303). — Ed.

fact, and a verdict is rendered, a motion in arrest, on the ground that no cause of action is shown, comes too late. *Saulsbury v. Alexander*, 50 Mo., 142. For if facts requisite to constitute a cause of action are necessarily inferable from the pleadings taken in their entirety, judgment will not be arrested after verdict. *Corpenny v. Sedalia*, 57 Mo., 88; *Edmondson v. Phillips*, 73 Mo., 57.<sup>1</sup> . . .

## DEAN v. ROSS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1901.

[Reported 178 *Massachusetts*, 397.]

LORING, J.<sup>2</sup> 1. The defendant's first contention is that she is entitled to have judgment arrested because it is not alleged in the declaration that the plaintiff owned or was in possession of the bonds which it is alleged that the defendant converted to her own use. But such an objection is taken too late; it does not go to the jurisdiction of the court. *Commonwealth v. Mackay*, 177 Mass. 345. The case of *Carlisle v. Weston*, 1 Met. 26, relied on by the defendant, was decided before it was provided by statute that no motion in arrest of judgment should be allowed unless it is for a cause which affects the jurisdiction of the court.<sup>3</sup> St. 1852, c. 312,

<sup>1</sup> See *Elliot v. Stuart*, 15 Me. 160.

But the defect may be taken advantage of on a motion at the trial to dismiss the complaint. *Scofield v. Whitelegge*, 49 N. Y. 259; *Tooker v. Arnoux*, 76 N. Y. 397. But see *Grace v. Nesbitt*, 109 Mo. 9, 18 S. W. 1118.

A defect in the pleading of one party in omitting a necessary allegation is cured by an express admission in a subsequent pleading of the same party. *Brooke v. Brooke*, 1 Sid. 184; *Slack v. Lyon*, 9 Pick. (Mass.), 62.

As to whether a party can supply an omission in one pleading by an allegation in his own subsequent pleading, see *Marine Trust Company v. St. James A. M. E. Church*, 85 N. J. L. 272, 88 Atl. 1075. But see *Kearney County Bank v. Zimmerman*, 5 Neb. (Unof.), 556, 99 N. W. 524.

Defects of form, which cannot be taken advantage of on a general demurrer, cannot, of course, be taken advantage of on a motion in arrest of judgment. *Stephen*, Pleading, Will. ed., \*161.

And on a motion in arrest of judgment after verdict, even at common law, the successful party's pleadings will be construed liberally in his favor. *Burgess v. Brazier*, 1 Str. 590; 1 Chitty, Pleading, 16th Am. ed., \*262.

Under the codes, objections to defects on the face of the complaint, not taken by demurrer, are waived, except the objections of lack of jurisdiction and of a failure to state facts showing a cause of action. — ED.

<sup>2</sup> The statement of facts and a part of the opinion are omitted. — ED.

<sup>3</sup> This statute (now R. L. c. 173, sec. 118), provides: "A judgment shall not be arrested for a cause existing before the verdict, unless such cause affects the



§ 22. Gen. Sts. c. 129, § 79. Pub. Sts. c. 167, § 82. Moreover in this case the fact appeared in evidence, which did not appear in *Carlisle v. Weston*, namely, that the property converted belonged to the plaintiff; and in addition to that, in this case it was assumed in the charge of the judge that the bonds were confessedly the property of the plaintiff, and to that statement the defendant made no objection. . . .

*Exceptions overruled.*

HOLLIS & another v. RICHARDSON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1859.

[Reported 13 *Gray*, 392.]

WRIT OF ERROR on a judgment of the court of common pleas in an action of contract brought by Gideon D. Richardson upon two promissory notes made by the plaintiff in error, and payable to Eliphalet W. Richardson, but not purporting to be payable to order.

In that action, each count was in this form: "And the plaintiff says, the defendants made a promissory note, a copy whereof is hereto annexed, payable to Eliphalet Wharff Richardson, and the plaintiff is the owner of said note, and the defendants owe him the amount of said note and interest thereon." Copies of the notes were annexed to the declaration. The defendants filed an affidavit of merits, but were afterwards defaulted, and judgment was rendered against them for the amount claimed.

The error assigned was, that the notes were not negotiable, and were not made to Gideon D. Richardson, and he could maintain no action at law thereon. Plea, *in nullo est erratum*.

SHAW, C. J. The ground of this writ of error is, that the declaration shows no cause of action in the plaintiff. The judgment having been rendered upon the default of the defendant, the case is not within the provisions of the new practice act, which prohibit the taking of objections in arrest of judgment or by writ of error, for causes existing before verdict, in any case in which a verdict has been rendered. St. 1852, c. 312, §§ 22, 77.

It was not a question of the admission or rejection of evidence, which, if not made at the trial, cannot be taken afterwards; because jurisdiction of the court. After the defendant has appeared and answered to the merits of the action, no defect in the writ or other process by which he has been brought before the court, or in the service thereof, shall be considered to affect the jurisdiction of the court." — Ed.

there was no trial. Nor did the court below adjudge the sufficiency of the evidence to maintain the action; for, the judgment being on default, no evidence was laid before them.

Nor is it a case within the rule of the common law, where a good title, or cause of action, imperfectly set out in the declaration, may be cured by a verdict. The reason is, that a verdict presupposes a trial, and the action of the judge on the matter of law; and the court therefore, after verdict, will presume that the evidence necessary to support the action was required and given, though such good title and legal cause of action were not correctly stated.

The question is, whether there is enough in the declaration, of which the notes themselves are part, and of course, part of the record, to sustain the judgment. The declaration sets forth the making of a note payable to a person other than the plaintiff, and not negotiable. It then adds that "the plaintiff is the owner of said note." But how can he own it? Only as assignee in equity, which, by law, does not enable him to sue in his own name.

It is said, however, that there may have been an express promise by the defendants to pay the plaintiff. But if that was so, the declaration should not have been on the note, but on the new and express promise, of which the assignment of the note was the consideration. *Mowry v. Todd*, 12 Mass. 281. By the practice act, although the facts may be briefly stated, all the facts must be stated which are necessary to constitute the cause of action. St. 1852, c. 312, § 2, cl. 3. This declaration does not state the facts, if they in truth existed, that the notes had been assigned to the plaintiff, and that, upon notice thereof, the defendants had made an express promise to him to pay them.

The plaintiff's final averment, "that the defendants owe him the amount of said note," is a mere statement of a conclusion of law from facts previously stated, and not an allegation of a distinct substantive fact. *Millard v. Baldwin*, 3 Gray, 484. If it could be treated as a distinct and sufficient averment, no other averment would be needed in any case.

*Judgment reversed.*

BUTCHER *v.* METTS.

DISTRICT COURT FOR THE CITY AND COUNTY OF PHILADELPHIA. 1836.

[Reported 1 *Miles*, 233.]

IN this case a verdict was rendered for the plaintiff, but judgment was arrested on account of the insufficiency of the verdict, 1 *Miles*, 153.<sup>1</sup> The plaintiff then obtained a rule to show cause why a *venire facias de novo* should not be awarded, the former trial having proved fruitless.

*Meredith*, who had been of counsel with the defendant, resisted the award of a new *venire*, and contended that upon the arrest of the judgment the action was at an end; that the defendant no longer had a day in court, and that there was no way in which he could be brought into court but by a new original.

*I. Norris, contra.*

The opinion of the Court was delivered by

JONES, J. An arrest of judgment is in effect nothing more than superseding a verdict for some cause apparent upon the record, which shows that the plaintiff is not entitled to the benefit of the verdict. It is often followed by a judgment for the defendant, that he go without day, but it is not of itself a judgment for the defendant. The court may, after an arrest of judgment, award a repleader or a *venire de novo* without a repleader. Which of these courses is the proper one, depends upon the nature of the defect for which the judgment is arrested. If it appears by the record that the plaintiff has no cause of action, the court will give judgment, after the arrest of judgment on the verdict, that the plaintiff take nothing by his writ, and that the defendant go without day. If issue be joined upon an immaterial point, there being a sufficient cause of action alleged in the declaration, the proper course is to award a repleader. If the pleadings be sufficient and the issue well joined, but the verdict is imperfectly found, it is usual to award a *venire de novo*; and this it is said may be done upon the motion of the defendant, without a motion in arrest of the judgment.

The *venire de novo* is an ancient proceeding of the common law. It was in use long before the practice of granting new trials. It follows of course upon the granting of a new trial; but as a distinct proceeding it is commonly adopted after a bill of exceptions or after

<sup>1</sup> See *supra*, p. 425. — Ed.

a special verdict imperfectly found, but always for some cause apparent on the record, and if granted when it should not be, it is error, and the award of it may be reversed.

A new trial, on the other hand, is commonly granted after a general verdict for some cause not apparent on the record, and it is not assignable for error. *Hambleton v. Veere*, 2 Saund. Rep. 1716, (n. 1); *Goodtitle v. Jones*, 7 T. Rep. 43, 48; *Witham v. Lewis*, 1 Wils. Rep. 48, 56; Com. Dig., tit. Pleader, R. 18; 1 Sellon's Practice, ch. 11, sect. 3, (C. D.); *Miller v. Ralston*, 1 Serg. & Rawle 309; *Ebersol v. Krug*, 5 Binn. 53; *Lessee of Pickering v. Ratty*, 1 Serg. & Rawle 515.

In this case the fault was in the verdict. Of course it appears upon record. A *venire facias de novo* is therefore proper.

In regard to the objection that the defendant is no longer in court in this action, it should be observed that the judgment was arrested at this term, and no judgment has been entered for the defendant. He is therefore still in court and bound to take notice of the further proceedings in the cause. But if the term had been allowed to elapse after the arrest of judgment, and the cause had not been continued by a *curia adv. vult*, according to strict notions of practice, the action would have been discontinued, and the defendant without day in court. *Venire de novo awarded.*<sup>1</sup>

KITCHENMAN v. SKEEL and Another, Executors of  
NICHOLL, deceased.

EXCHEQUER. 1848.

[Reported 3 *Exchequer*, 49.]

DEBT. The declaration stated, that H. Nicholl, since deceased, in his lifetime was indebted to the plaintiff in 80*l.* for wages, and for work and labour, and for money due upon an account stated, which sum of 80*l.* was to be paid by H. Nicholl, deceased, to the plaintiff, on request. And also, that the defendants, as executors as aforesaid, after the death of H. Nicholl, were indebted to the plaintiff in 80*l.* for work and labour by the plaintiff then done and performed for the defendants, as executors as aforesaid, and for money found to be due from the defendants, as such

<sup>1</sup> But if the defect is not apparent on the face of the verdict, advantage cannot be taken of it on such a motion. *Fuller v. Chamberlain*, 11 Met. (Mass.), 503.

As to amendment of verdicts see *supra*, Chapter VII, Section X. — Eb.



executors as aforesaid, on divers accounts between the plaintiff and the defendants, as such executors, before then stated between them; and which last-mentioned sum of 80 *l.* was to be paid by the defendants, as executors as aforesaid, to the plaintiff, on request." Breach, non-payment by H. Nicholl in his lifetime, or by the defendants, as executors as aforesaid, since the decease of H. Nicholl.

The defendants pleaded "never indebted," with other pleas.

The cause was tried before Rolfe, B., at the London Sittings in last Hilary Term, and a general verdict found for the plaintiff for the debt and damages.

*Lush* having obtained a rule nisi to arrest the judgment, on the ground of a misjoinder of the causes of action,

*Miller* shewed cause. — The cases of *Ashby v. Ashby*, 7 B. & C. 444, and *Tugwell v. Heyman*, 3 Camp. 297, shew that, in some instances, an executor may be liable in his representative character on a cause of action which accrued subsequent to the death of his testator; but, after the case of *Corner v. Shew*, 3 M. & W. 350, it is conceded that a count for work and labour by the defendant, as executor, cannot be joined with a count for money found to be due on an account stated with the defendant as executor. If, therefore, the second count had merely contained the claim for work and labour, it would not have supported the verdict; but when that claim is coupled with another, with which the causes of action in the first count can be properly joined, the Court will, after verdict, presume that the judge directed the jury to give, and that the jury have only given, damages in respect of such of the causes of action as were properly joined: *Stennel v. Hogg*, 1 Wms. Saund. 228, n. 1. The case resembles a count in slander, containing words which are actionable coupled with words not actionable, when it will be intended, after verdict, that the damages were awarded only in respect of the actionable part. At all events, the Court will not arrest the judgment, but only grant a *venire de novo*. Wherever a bad count is joined with a good count, and general damages are given, a *venire de novo* may be awarded: *Corner v. Shew*, 4 M. & W. 163; *Leach v. Thomas*, 2 M. & W. 427; *Ayrey v. Fearnside*, 4 M. & W. 168. [Parke, B. — This is not the case of a bad count and a good count, but of a misjoinder of causes of action. It is settled, that where there is a misjoinder of counts, and the jury find general damages, a *venire de novo* cannot be awarded. The question here is, whether it makes any difference that the misjoinder is in two parts of the same count.]

*Lush*, in support of the rule. — This case is distinguishable from that of a single count containing a good and also a bad cause of action. There, perhaps, the Court would presume that the judge directed the jury to find damages in respect of the good part only. Here each count contains a good cause of action, and the jury are bound to find on every part of each. *Corner v. Shew*, 3 M. & W. 350, governs the present case. The plea of non assumpsit raises a distinct issue on each and every part of the counts. [Parke, B. — In *Doe d. Lawrie v. Dyeball*, 8 B. & C. 70, the Court said, “It is a settled rule, that if the same count contains two demands or complaints, for one of which the action lies, and not for the other, all the damages shall be referred to the good cause of action, although it would be otherwise if they were in separate counts.” Therefore, if this had been the case of a count in assumpsit for a cause of action which could not be joined with another good cause of action, the judgment would not be arrested; but here there are two counts, both containing good causes of action. A venire de novo only issues on a supposed misconduct of the jury in making a defective finding.]

POLLOCK, C. B. The rule must be absolute. We are bound by the case of *Corner v. Shew*, in which the Court took time to consider their judgment. In that case there was a misjoinder of counts; and, the jury having found general damages, the Court arrested the judgment. I cannot distinguish between the misjoinder of several counts and the case of one count consisting of several causes of action which ought not to have been joined.

PARKE, B. I am of the same opinion. This case is decided by *Corner v. Shew*. It is a misjoinder of causes of action in the same count; and, according to the authority of *Corner v. Shew*, the objection cannot be cured by a venire de novo, since it is a matter in which the jury are bound to assess the damages on every part of the cause of action. It is true, that, if the jury had been directed to find for the defendant on the second count, the defect would have been cured. So, likewise, if a nolle prosequi had been entered as to that count; but general damages having been assessed upon the whole, the case falls within the principle of *Corner v. Shew*, and we have no reason to doubt the propriety of that decision.

ALDERSON, B. *Corner v. Shew* determined, that where two counts which are good, but cannot be joined, are improperly joined, the course is to arrest the judgment. Here the declaration consists of two counts, each of them good, but the second containing a cause of action which cannot be joined either with the other cause

of action in that count or with the first count. It is, in truth, the same as three counts, one of which cannot be joined with the other two.

ROLFE, B. There never can be a venire de novo, except where the jury must find differently, in order to make the record consistent. It is true, that, if the jury had found for the defendant on the second count, the objection might have been cured; but then they were of opinion that the plaintiff had made out his case upon the whole declaration, and they were bound to find accordingly.

*Rule absolute.*<sup>1</sup>

### POSNETT v. MARBLE.

SUPREME COURT OF VERMONT. 1889.

[Reported 62 *Vermont*, 481.]

THIS was an action for slander, the declaration containing five counts. Plea, the general issue with notice of special matter in justification. Trial by jury. Verdict for the plaintiff. The defendant moved in arrest of judgment for the insufficiency of the declaration. Judgment for the plaintiff.

MUNSON, J.<sup>2</sup> . . . The several counts purport to be for words spoken upon different occasions. A general verdict was rendered upon all the counts. The second, third and fifth counts are held to be insufficient, and the court has no means of determining upon which counts the damages were in fact assessed.

<sup>1</sup> If the jury find for the plaintiff on one of two counts improperly joined and for the defendant on the other, the judgment will not be arrested. *Kightly v. Birch*, 2 M. & S. 533; *Sellick v. Hall*, 47 Conn. 260.

And where the jury find for the plaintiff on two counts improperly joined but assess the damages separately, judgment will be arrested only on one of the counts. *Hancock v. Haywood*, 3 T. R. 433.

As to amending the verdict in case of misjoinder of counts, see *Eddowes v. Hopkins*, 1 Doug. 376; *Lusk v. Hastings*, 19 Wend. (N. Y.), 627. See also a note to 2 Wms. Saund. (Sir E. V. Wms. ed.) p. 493.

See 1 Chitty, Pleading, 16th Am. ed., \* 228.

Under the codes, the objection of misjoinder of causes of action, if not taken by demurrer or answer is waived. "When, on the face of a petition, no ground of demurrer appears, the objection may be taken by answer. If the objection is not made in either way, the defendant shall be deemed to have waived it, except only that the court has no jurisdiction of the subject of the action and that the petition does not state facts which show a cause of action." Ohio Gen. Code, *see*, 11311. — Ed.

<sup>2</sup> The statement of facts is unbridged and a part of the opinion is omitted. — Ed.

This being the situation, what disposition shall be made of the case? The courts are not agreed as to the procedure. One course is to end the suit by arresting the judgment. Another course is to award a *venire de novo*. In *Haselton v. Weare*, 8 Vt. 480, the court arrested the judgment, saying that this was in accordance with the settled rule in England. The court had before it English cases in which this course had been taken, but the English practice up to that time was far from uniform, and the other method has since prevailed. One of the cases relied upon by the court in *Haselton v. Weare*, was *Holt v. Scholefield*, 6 T. R. 691. But this case was expressly overruled by *Leach v. Thomas*, 2 M. & W. 427, soon after *Haselton v. Weare* was decided. In *Leach v. Thomas*, it was said that this point did not appear to have been at all argued in *Holt v. Scholefield*; and in *Corner v. Shew*, 4 M. & W. 162, Parke, B., in stating that the point had been considered doubtful before the decision of *Leach v. Thomas*, expressed surprise that such a doubt should have existed, inasmuch as the matter had been provided for by rules of court in both the King's Bench and the Common Pleas as early as 1654. In *Empson v. Griffin*, 11 Ad. & E. 186, the court of Queen's Bench followed the decision in *Leach v. Thomas*, and awarded a *venire de novo*.

The rule adopted in *Haselton v. Weare* has never been cordially approved. In *Wood v. Scott*, 13 Vt. 42, the court considered the question settled, but REDFIELD, J., referred with evident sympathy to the regret expressed by Lord Mansfield in *Peake v. Oldham*, Cowp. 275, that such a rule had been established. In *Camp v. Barker*, 21 Vt. 469, and in *Whitcomb v. Wolcott*, 21 Vt. 368, the court vigorously criticised the rule, and indicated its intention to make all reasonable intendments in favor of a verdict when some of the counts were good. In the latter case, the court referred to the modern English practice of awarding a *venire de novo* where it could be done, as the true course, but considered that this could not well be done in a court of error. In *Joy v. Hill*, 36 Vt. 333, the motion in arrest was disposed of on the ground of a misjoinder of counts, the question whether the expressions in more recent cases had abrogated the law as declared in *Wood v. Scott* being recognized but not considered. In 1865 the difficulty was removed by statute as far as declarations containing only counts for the same cause of action are concerned. R. L. 913. In *Dunham v. Powers*, 42 Vt. 1, and in *Kimmis v. Stiles*, 44 Vt. 351, decided since this enactment, the counts not being for the same cause of action, it was considered that judgment should be arrested.



In view of the misapprehension under which the rule was adopted, the position afterwards taken in regard to it, and the modern vindication in the English courts of the earlier and better practice, we are inclined to extend the benefit of a new trial to cases like this. Upon a mistrial of this character, we think the law may conveniently and properly give the litigants a more substantial justice than is afforded by an arrest of judgment. That the proposed action may properly be taken by this court is apparent from the settled practice of many courts of error. The nature of the proceeding is fully stated in *Corner v. Shew*, above cited. The theory is that the defect is in the verdict. The order is made, in the language of the ancient rule, "as upon an ill verdict." By sending back the case an opportunity is given to have the damages assessed upon the good counts only. The plaintiff will also be entitled to the usual privileges of amendment under the rules of the trial court.

*Judgment reversed. New trial granted on condition that plaintiff pay defendant's costs heretofore incurred in the court below, and take no costs for that time in the event of a final recovery; and if a new trial is not desired upon these terms, plaintiff to become non-suit. Cause remanded.*<sup>1</sup>

<sup>1</sup> In *Dean v. Cass*, 73 Vt. 314, 50 Atl. 1085, the court granted a *venire de novo* for misjoinder of causes of action; and in *Baker v. Sherman*, 73 Vt. 26, 50 Atl. 633, *supra* p. 495, the court granted a *venire de novo* for a defect in the declaration. But these cases are opposed to the common law rule.

If the jury find separately on the several counts, the plaintiff is entitled to judgment on the good counts.

And in a criminal action, a general verdict of guilty is construed to be a verdict of guilty on each count of the indictment. See *State v. Huggins*, 84 N. J. L. 254, 87 Atl. 630. Compare *Lewis v. Niles*, 1 Root (Conn.), 433.

If several causes of action, some of which are defective, are stated in the same count, and the jury find for the plaintiff with general damages, the plaintiff is entitled to judgment on the verdict, because it will be presumed that the judge directed the jury to disregard the defective allegations. See 1 Chitty, Pleading, 16th Am. ed., \*714. Compare *Hagar v. Norton*, 188 Mass. 47, 73 N. E. 1073.

If there are several counts all for the same cause of action, and a general verdict for the plaintiff, the general verdict may be applied to the good count, and judgment entered thereon. *Smith v. Cleveland*, 6 Met. (Mass.), 332; *Aldrich v. Lyman*, 6 R. I. 98. See 1 Chitty, Pleading, 16th Am. ed., \*714.

So, too, the verdict may be amended where the evidence was directed wholly to the good count. *Williams v. Breedon*, 1 B. & P. 329; *Stafford v. Green*, 1 Johns. (N. Y.), 505; *Norris v. Durham*, 9 Cow. (N. Y.), 151.

The rule is the same where the jury was instructed that the plaintiff was not

## SECTION II.

*Motion for Judgment before or notwithstanding the Verdict.*

CRAVEN v. HANLEY.

COMMON PLEAS. 1738.

[Reported *Barnes's Notes*, 184.]

THIS was an action of trespass, whereto defendant pleaded a bad justification. Plaintiff took issue, and defendant obtained a verdict. Plaintiff moved in arrest of judgment, and the court heard counsel on both sides several times, and took time to consider; and in Easter term last made a rule to stay the entry of judgment on defendant's verdict, and that plaintiff should have leave to sign judgment, the trespass being confessed by the plea.<sup>1</sup> . . .

STREITWEISER v. LIGHTBOURN.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1913.

[Reported 87 *Connecticut*, 527.]

ACTION to recover damages for personal injuries alleged to have been caused by the defendant's negligence in running his automobile into and over the plaintiff, brought to the Superior Court in New Haven County and tried to the jury before Gager, J.; verdict and judgment for the plaintiff for \$700, and appeal by the defendant. *No error.*

PER CURIAM. The evidence in this case is such that the issues as to the defendant's negligence and the plaintiff's lack of contributory negligence were properly submitted to the jury, and from it

entitled to recover on the defective count. *Richmond v. Whittlesey*, 2 Allen (Mass.), 230. See also *Morrin v. Manning*, 205 Mass. 205, 91 N. E. 308.

By statute in many jurisdictions it is provided that whenever an entire verdict shall be given on several counts, it shall not be set aside or reversed on the ground of any defective count, if one or more of the counts in the declaration shall be sufficient to sustain the verdict. *Bond v. Dustin*, 112 U. S. 604, 28 L. ed. 835, 5 S. Ct. 296 (Illinois law); *Bishop v. Williamson*, 11 Me. 495. — ED.

<sup>1</sup> At common law the plaintiff was entitled to judgment *non obstante verdicto* originally only if the defendant interposed an insufficient affirmative plea expressly confessing the allegations in the plaintiff's declaration. As to how far this rule was subsequently relaxed, see Ames, *Cases on Pleading*, ed. of 1905, 265. — ED.

the jury might reasonably have found in favor of the plaintiff upon both issues. The court did not err in so holding, and in refusing to set aside the verdict.

The defendant's motion for a judgment notwithstanding the verdict was entirely inappropriate to the situation before the court. Such a judgment is not rendered upon the evidence, but upon the admissions of the pleadings.<sup>1</sup> The judgment is in its essence one by confession. The defendant's pleadings consisted solely of denials of the allegations of the complaint. Of necessity, therefore, there are no uncontroverted allegations entitling him to a judgment, even if it be assumed that such a judgment may be rendered in favor of a defendant upon the plaintiff's cause of action, as at common law it could not be. 1 Swift's Digest, s. p. 779; Stephen on Pleading, s. p. 98; Schermerhorn v. Schermerhorn, 5 Wend. (N. Y.) 513, 514; Smith v. Powers, 15 N. H. 546, 562; 11 Ency. of Pleading & Practice, 912, 913.

*There is no error.*<sup>2</sup>

HUMBOLDT MIN. CO. v. AMERICAN MANUFACTURING, MINING & MILLING CO. *et al.*

CIRCUIT COURT OF APPEALS OF THE UNITED STATES,  
SIXTH CIRCUIT. 1894.

[Reported 62 *Federal*, 356.]

THIS was a suit by the Humboldt Mining Company against the American Manufacturing Mining & Milling Company and the Variety Iron-Works Company for breach of contract. The iron-works company filed an answer to which the plaintiff filed a reply.

After the pleadings were completed, the iron-works company made a motion that on the pleadings judgment be entered in its favor. The court granted the motion, and accordingly entered the judgment which it is now sought to review by this writ of error.

Before TAFT and LUTON, Circuit Judges, and BARR, District Judge.

<sup>1</sup> By statute in some jurisdictions the trial court may on motion enter judgment notwithstanding the verdict, where at the trial a motion to direct a verdict was improperly denied. See *supra*, p. 492. — Ed.

<sup>2</sup> Although it was generally held at common law that the defendant was not entitled to judgment *non obstante veredicto*, the court might arrest the judgment on a motion for judgment *n. o. v.* Schermerhorn v. Schermerhorn, 5 Wend. (N. Y.), 513; Trow v. Thomas, 70 Vt. 580, 41 Atl. 652. — Ed.

TAFT, Circuit Judge.<sup>1</sup> . . .

Section 5328 of the Revised Statutes provides that:

“When, upon the statement in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, although a verdict has been found against such party.”

It was in accordance with this section that the court below entered the judgment here complained of. The contention on behalf of the plaintiff is that this section applies only after a verdict has been rendered, and that until then the court has no power to enter judgment. There is no such limitation in the words of the section, and it would seem to be absurd that when, upon the statements of the parties to the pleadings, one or the other is entitled to judgment, the court should go through the useless ceremony of submitting to a jury immaterial issues in order to enter judgment upon the pleadings without regard to the verdict. . . .

*The judgment of the circuit court is affirmed, with costs.*<sup>2</sup>

# MURPHY v. RUSSELL & others.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1909.

[Reported 202 *Massachusetts*, 480.]

TORT, for personal injuries received by the plaintiff while in the employ of two of the defendants, Merrill and Emerson, from falling down an elevator shaft in a building owned by Russell, the other defendant. Writ dated January 16, 1907.

The case was tried before Hitchcock, J. A verdict was ordered for the defendants under the circumstances stated in the opinion; and the plaintiff alleged exceptions.

The case was submitted on briefs. . . .

LORING, J.<sup>3</sup> At the close of the evidence in this case the defendant Russell and the defendants Merrill and Emerson asked the judge to rule that on the pleadings and the evidence the plaintiff was not entitled to recover. The judge granted the request and ordered a verdict for the defendants. . . .

The objection that the facts alleged in the declaration do not entitle the plaintiff to judgment can be raised by asking that a ver-

<sup>1</sup> The statement of facts is abridged, and a part of the opinion in which the defendant's plea is examined and held sufficient is omitted. — ED.

<sup>2</sup> See *Kime v. Jesse*, 52 Neb. 606, 72 N. W. 1050. — ED.

<sup>3</sup> A part of the opinion is omitted. — ED.



dict be ordered for the defendant as well as by demurrer. *Hervey v. Moseley*, 7 Gray, 479. *Hubbard v. Mosely*, 11 Gray, 170. *Nowlan v. Cain*, 3 Allen, 261, 263. *Oliver v. Colonial Gold Co.*, 11 Allen, 283. *Oulighan v. Butler*, 189 Mass. 287, 289. See also *Tracey v. Grant*, 137 Mass. 181. This practice presumably grows out of the rule introduced in the practice acts of 1851 and 1852 (now R. L. c. 173, § 118), that judgment shall not be arrested for a cause existing before verdict unless the cause affects the jurisdiction of the court. . . . *Exceptions overruled.*<sup>1</sup>

<sup>1</sup> In some jurisdictions the defendant may move orally at the trial to dismiss the action on the ground of want of jurisdiction or of failure to state a cause of action. *Tooker v. Arnoux*, 76 N. Y. 397. But see *Littlefield v. Railroad Co.*, 104 Me. 126, 71 Atl. 657.

In some jurisdictions the defendant may move to exclude all evidence under the declaration when it shows a want of jurisdiction or fails to state a cause of action. *Rothe v. Rothe*, 31 Wis. 570. — Ed.

## CHAPTER X.

### JUDGMENTS.

#### SECTION I.

##### *Form and Validity.*

[*Form of Entry of Judgment for Plaintiff on a Verdict.*]<sup>1</sup>

In the Queen's Bench.

The ..... day of ....., in the year of  
our Lord 18..... (*date of declaration.*)

Berks to wit. A. B. by E. F. his attorney complains of C. D., who has been summoned to answer the said A. B. by virtue of a writ issued on the ..... day of ....., in the year of our Lord 18....., out of the court of our lady the queen, before the queen herself at Westminster. For that (&c. *Copy the declaration from these words to the end, and the plea and subsequent pleadings, to the joinder of issue.*) Thereupon the sheriff is commanded that he cause to come here, forthwith, twelve &c., by whom &c. and who neither &c., to recognize &c., because as well &c.<sup>2</sup> Afterwards, the jury between the parties is respited until the ..... day of ..... (*return of distringas or habeas corpora,*) unless her majesty's justices assigned to take the assizes in and for the county of Berks shall first come, on the ..... day of ..... (*day of nisi prius,*) in the said county, according to the form of the statute in such case made and provided, for default of the jurors, because none of them did appear. Afterwards, on the ..... day of ..... (*day of signing final judgment,*) come the parties aforesaid by their respective attornies aforesaid; and the said justices of assize, before whom the said issue was tried, have sent hither their record had before them in these words: Afterwards, that is to say, on the day and at the place within contained, before sir....., knight, one of the justices of our lady the queen assigned to hold pleas before the queen herself, and sir....., knight, one of the justices of our lady the queen, assigned to take the assizes in and for the county of Berks, according to the form of

<sup>1</sup> See Chitty, Forms, 6th ed. (1847), pp. 45, 95, 106. — ED.

<sup>2</sup> The full statement of the words omitted may be found in 3 Bl. Com., App. x. — ED.

the statute in such case made and provided, come as well the within-named plaintiff as the within-named defendant, by their respective attornies within mentioned; and the jurors of the jury, whereof mention is within made, being summoned also come, who, to speak the truth of the matters within contained, being chosen, tried and sworn, according to the form of the statute in such case made and provided, say upon their oath that the defendant did promise, in manner and form as the plaintiff hath within complained against him; and they assess the damages of the plaintiff, on occasion of the not performing the promises within mentioned, over and above his costs and charges by him about his suit in this behalf expended to £ —, and for those costs and charges to forty shillings. Therefore, it is considered that the said A. B. do recover against the said C. D. his said damages, costs and charges by the jurors aforesaid in form aforesaid assessed; and also £ — for his costs and charges by the court here adjudged of increase to the said A. B. with his assent, which said damages, cost and charges, in the whole, amount to £ —; and the said C. D. in merey, &c.

[*New Jersey Judgment Record.*]<sup>1</sup>

In the Supreme Court of New Jersey.

A. B. }  
 vs. } Judgment Record.  
 C. D. }

C. D., the defendant in this cause, was summoned to answer unto A. B., the plaintiff therein, in an action at law upon the following complaint: (*Copy complaint*).

The defendant answered as follows: (*Copy the answer and further pleadings, if any*).

This action was tried before Justice M. N. with (*or without*) a jury, at the — Circuit, on December 10, 1911.

The cause having been heard and submitted to the jury, they return their verdict as follows: (*Copy verdict, general or special*).

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of — dollars (\$ —) and his costs, which are taxed at the sum of — dollars (\$ —), making in the whole the sum of — dollars (\$ —).

Judgment entered December —, 1911.

<sup>1</sup> See New Jersey Practice Act, 1912, Schedule B (Pamph. L. 1912, pp. 408, 409). — Ed.

[*Modern English Form of Judgment.*] <sup>1</sup>

19—. [*Here put the letter and number.*]

In the High Court of Justice,  
..... Division.

Between A. B.,                  Plaintiff.  
                              and  
C. D.,                  Defendant.

---

30th November, 19...

The action having on the 12th and 13th November, 19.... been tried before the Honourable Mr. Justice ..... with a special jury of the county of ....., and the jury having found [*state findings*], and the said Mr. Justice ..... having ordered that judgment be entered for the plaintiff for £ ..... and costs: Therefore it is adjudged that the plaintiff recover against the defendant £ ..... and £..... for his costs.

[*Arkansas Judgment.*] <sup>2</sup>

Richard Roe, plaintiff,  
*against*  
 John Doe, defendant. } Judgment.

The parties appeared by their attorneys, and the defendant filed a demurrer to the complaint, and the questions of law arising thereon being heard, it is adjudged by the court that the complaint is insufficient, and the plaintiff refusing to plead further, it is ordered, considered and adjudged by the court that the complaint be dismissed and that the defendant recover of the plaintiff his costs herein expended.

CHURCH *v.* CROSSMAN.

SUPREME COURT OF IOWA. 1875.

[Reported 41 *Iowa*, 373.]

THIS action is brought upon a judgment of a justice of the peace in St. Lawrence County, New York. The court sustained a demurrer to the petition, and the plaintiff refusing to amend, judgment for costs was rendered for the defendant. Plaintiff appeals. The further facts appear in the opinion.

<sup>1</sup> See Rules of the Supreme Court, 1883, Appendix F (Annual Practice, 1915, p. 1497). — ED.

<sup>2</sup> See Kirby, Digest of the Statutes of Arkansas, p. 1663. — Ed.



MILLER, CH. J. The transcript of the judgment sued on is as follows:

"State of New York, St. Lawrence Co., town of Gouverneur.  
In Justice's Court, before J. B. Preston, Esq., J. P.

|                   |   |                                                                                                |
|-------------------|---|------------------------------------------------------------------------------------------------|
| DANIEL CHURCH,    | } | FEBRUARY, 16th, 1874.                                                                          |
| against           |   | Judgment rendered in favor of                                                                  |
| HENRY C. CROSSMAN |   | plaintiff against defendant on<br>the above cause on contract<br>on process personally served. |
| Debt.....         |   | \$200.00.                                                                                      |
| Costs.....        |   | 2.40.                                                                                          |
| Judgment.....     |   | <hr/> \$202.40.                                                                                |

ST. LAWRENCE COUNTY, ss.

I certify that the above is a true copy of a judgment rendered by and before me, and now remaining unsatisfied upon my docket.

Witness my hand this 11th day of April, 1874.

J. B. PRESTON,

*Justice of the Peace."*

This judgment was duly authenticated by the clerk of the Supreme Court of the county, but as no question is made upon the authentication, the certificate is omitted from this opinion. The court sustained the demurrer on two grounds, as follows:

"1. The transcript does not show that any judgment was ever rendered by any court."

"2. The transcript does not show the findings or adjudication of the court in said case."

It is settled by the decisions of this court, that no particular form of words is necessary to show the rendition of a judgment. See *Barrett v. Garragan*, 16 Iowa, 47, and cases cited in the opinion. Where the time, place, parties, matters in dispute, and an adjudication thereon appear it is sufficient. *Ibid*.

In the transcript before us we have the time, place, parties, matter in dispute and the result, concisely and clearly stated. It is stated that "judgment is rendered for the plaintiff against the defendant"; that such judgment is in the cause entitled "Daniel Church v. Henry C. Crossman"; that the judgment is rendered "on contract"; that such judgment was rendered upon "process personally served," and the amount of the judgment is clearly stated. The case is clearly within the cases above cited. The

transcript shows all the requisites of a valid judgment as clearly as in *Barrett v. Garragan*, *supra*, or in *Somers v. Milledge et al.*, 1 Iowa, 150, in both of which the court held the judgments sued on to be sufficient.

The court below erred, therefore, in sustaining the demurrer and its judgment must be *Reversed.*<sup>1</sup>

EVERY & ENSIGN v. BABCOCK.

SUPREME COURT OF ILLINOIS. 1864.

[Reported 35 *Illinois*, 175.]

WALKER, C. J.<sup>2</sup> This was a motion to quash an execution, and set aside a sale made under it. The judgment was originally rendered by a police magistrate in the city of Galesburgh. An execution was issued and returned no property found. Afterwards a transcript of this judgment was filed in the office of the circuit clerk of Knox county, upon which the clerk issued an execution upon which the sale was made. The transcript of the police magistrate contains this entry: "On day of trial, suit called, defendant appeared and acknowledged the above amount correct; judgment is therefore rendered by confession against H. B. Avery & G. D. Ensign for the sum of 383.18 debt and 2.39 costs." The caption to this judgment states the demand to be "383.18" and is manifestly what was referred to in the judgment, as the "above amount." On the hearing the motion was overruled and exceptions were taken.

The ground relied upon for a reversal is, that the judgment is indefinite and uncertain. There is no word, mark or character, which, in any manner, indicates for what the judgment is rendered. It is true that there are the figures "383.18," but whether they are intended to represent that number of American, English or German coins, we are left entirely to conjecture. Nor is anything found in the record from which it can be certainly inferred. It may be said, that indebtedness is usually for dollars and decimal fractions of a dollar, but we know it is not of unfrequent occurrence that agreements are made for sums in other coins, especially when made in other countries. The decisions of this court are uniform,

<sup>1</sup> See 1 Black, Judgments, 2d ed., secs. 114, 115; 1 Freeman, Judgments, 4th ed., secs. 46-55. — ED.

<sup>2</sup> The statement of facts and a part of the opinion are omitted. — ED.

that in a judgment for money the sum must be specified in words or figures with some mark or character designating the precise sum. *Lawrence v. Fast*, 20 Ill. 338; *Lane v. Bommelmann*, 21 Ill. 143; *Eppinger v. Kirby*, 23 Ill. 521; *Dukes v. Rowley*, 24 Ill. 211; *Bailey v. Doolittle*, id. 577. This case falls clearly within the rule announced in these cases, and no reason is perceived why it should not be governed by it. . . . *Judgment reversed.*<sup>1</sup>

BETTS *v.* BUTLER *et al.*

SUPREME COURT OF IDAHO TERRITORY. 1868.

[Reported 1 *Idaho*, 185.]

CUMMINS, J.<sup>2</sup> The plaintiff in his complaint demands judgment for the sum of four hundred and twenty dollars on a promissory note, of which he avers he is the owner and holder, and which it is declared was made and executed by the defendants. The only issue, as appears from the record presented to the jury, was fraud in the execution of the note; that it was executed by one having no authority, and under circumstances which were a fraud upon the rights of the defendants making this answer, namely, Taylor and Andrews.

It is admitted by the pleadings that there was such a note as that set out in the complaint, and there was no issue as to the amount due on such note, if valid for any purpose against these defendants. In short, the only issue made by the pleadings and tried before the jury upon which they were called to pass, was, Did the element of fraud enter into the execution of this note, or was there a want of power or authority in the defendant, Butler, to bind the firm of which he was one member and his co-defendants the other? In answer to this issue the jury return for their verdict that "we find in favor of the plaintiff"; that is, that there was no fraud in the execution of the note, the subject of this action. On this verdict the plaintiff made his motion for judgment for the amount demanded in the prayer of his complaint, which was

<sup>1</sup> *Carpenter v. Sherfy*, 71 Ill. 427, *accord.* *Carr v. Anderson*, 24 Miss. 188, *contra.*

As to the necessity of designating the amount for which judgment is rendered, see 1 Black, *Judgments*, 2d ed., secs. 118, 150; 1 Freeman, *Judgments*, 4th ed., secs. 48, 48a, 50b; 11 *Encyc. of Pl. & Pr.* 935-947. — Ed.

<sup>2</sup> A part of the opinion is omitted. — Ed.

granted by the court. From this the defendants who appeared in the action appeal, and assign as error that the court below had no authority to enter a judgment for four hundred and twenty dollars, or for any other definite sum, on this verdict; but contend that the verdict, in order to authorize such a judgment entry, should have found the amount due the plaintiff. This is assumed upon sections 175 and 176 of the civil practice act.<sup>1</sup>

I cannot assent to the construction placed upon these sections by the appellants' counsel; although it would probably be the better practice in such cases to require the jury to find the amount of the demand, yet this omission does not deprive the prevailing party of his right to have judgment for the sum due. It certainly could not have been the intention of the law-makers to absolutely require a jury to find in their verdict that a certain definite sum was due the plaintiff or the defendant, as the case might be, where there was no controversy as to the amount for which judgment should be given. If the court had instructed the jury to find the amount due, provided they found for the plaintiff on the issue of fraud, it could only have said to them, you will find the sum of four hundred and twenty dollars, for this is the amount admitted and about which there is no question. Hence, at most it is but matter of form, the omission of which will not vitiate the proceedings.

In the case of *Williams v. Willis*, 7 Abb. Pr. 90, the court says that "the facts that the work performed and materials furnished, to recover for which the action was brought, had been done and furnished by the plaintiff, and the amount he was entitled to receive was agreed upon and admitted, but the defendant denied that the contract therefor was made by her with the plaintiff, as alleged in the complaint. On that issue the jury found in favor of the plaintiff. That fact alone would not be sufficient to enable the court to pronounce judgment, even if the jury had answered yes, instead of finding as they did; because it would not appear from such finding whether the work was done, or the materials furnished, or what amount the plaintiff was entitled to receive for his labor, if done, and materials, if furnished. The verdict was not, therefore, a special verdict. It may be regarded as a verdict in the nature of a special verdict as to one issue, or a special finding upon a particular issue. If any amendment of the verdict were necessary, the case of

<sup>1</sup> Sec. 176 provides that "when a verdict is found for the plaintiff, in an action for the recovery of money, . . . the jury shall also find the amount of the recovery." — Ed.



Burhaus v. Tibbets, 7 How. Pr. 21, illustrates the power of the court to permit it to be made; but I think it unnecessary. The verdict of the jury left nothing incomplete, and the court, taking the admitted facts, with the verdict of the jury, could have no hesitation as to the judgment to be rendered."

Under this authority there can be no question of the correctness of the judgment rendered in the case at bar. As already stated, the execution and ownership of the instrument upon which the action is based, as well as the amount due if a valid note, were all admitted by the pleadings, which admissions are as binding and effectual as if expressed in terms. These admitted facts, taken with the verdict, in the language of Judge Brady, left nothing incomplete, and the court could have but one thing to do, that of ordering judgment for the party entitled under such admissions and the verdict, and for the amount prayed for on the note, as was done by the court in this case.

G. TAYLOR *et al.*, as Partners under the firm name of  
THE FLORIDA ORANGE HEDGE FENCE COM-  
PANY v. A. G. BARNHAM & CO.

SUPREME COURT OF FLORIDA. 1895.

[Reported 35 *Florida*, 297.]

TAYLOR, J.<sup>1</sup> The defendants in error, as plaintiffs below, sued the plaintiffs in error, as defendants below, in the Circuit Court of Orange county, in assumpsit upon an account for work and labor and materials; the suit being instituted against the defendants as former copartners. All of the defendants appeared by attorney, and all joined in a plea of *nil debet*. Although this form of plea is expressly prohibited by our 68th Rule of Practice in common-law actions, the plaintiffs joined issue thereon. After thus joining issue the parties by consent had the cause referred to an attorney, as referee, for trial. . . .

By agreement of counsel representing all parties the cause was set down for trial on February 17th, 1890, and on that day the referee rendered judgment in favor of the plaintiffs, the judgment being in the following form:

<sup>1</sup> A part of the opinion is omitted. — ED.

"In the Circuit Court, 7th Judicial Circuit of Florida, Orange county.

A. G. Barnham & Co. v. }  
Collis Ormsby *et al.*, doing }  
business as the Florida Or- }  
ange Hedge Fence Co.

On the 17th day of February, A.D. 1890, the above cause came on to be heard, and after argument of counsel and a careful examination of the testimony, I find that the defendants are indebted to the plaintiffs in the sum of eight hundred and thirteen dollars and thirty cents as principal, and seventy-five dollars and eighty-three cents interest. It is therefore ordered and adjudged that the plaintiffs do recover of and from the defendants the sum of eight hundred and eighty-nine dollars and thirteen cents, together with the further sum of twenty-eight dollars and forty-five cents (costs) of suit.

H. C. HARRISON,  
Referee."

The defendants then moved the referee to set aside his findings and to grant a rehearing of the cause upon the following grounds: . . . "6th. Because the . . . finding and judgment of the referee is vague and indefinite." Which motion the referee denied and refused. From this judgment the defendants take writ of error. . . .

Under the sixth ground of the motion for rehearing, the defendants contend that the judgment is void because it is vague and indefinite in that it fails, in the body of the judgment, to give the names of the plaintiffs in whose favor it is rendered, or the names of the defendants against whom it is pronounced, they being referred to therein simply as the "plaintiffs" and "defendants"; and that no valid execution can issue thereon to enforce the same, as it does not show from whom the adjudged amount is to be collected. There is no merit in this contention. The declaration gives accurately the names of each defendant; the judgment gives the style of the cause at its head with sufficient definiteness to show without doubt that the "plaintiffs" and "defendants" referred to therein are the same individuals named and designated as such in the declaration and throughout the proceedings composing the record in the cause. While it is best that a judgment should be so complete within itself as that the officer issuing the process to enforce it can see at a glance the parties for and against whom such process is to be issued, yet, if the parties for and against whom a judgment is rendered are so referred to therein as that a reference to its

caption, or to the pleadings, process and proceedings in the action, will make certain the names of the parties thus referred to, it is sufficient. Every judgment may be construed and aided by the entire record. 1 Freeman on Judgments (4th ed.), sec. 50a; *Smith v. Chenault*, 48 Texas, 455; *Little v. Birdwell*, 27 Texas, 688; *Hays v. Yarborough*, 21 Texas, 487; *Wilson & Wheeler v. Nance & Collins*, 11 Humph. (Tenn.) 189.

Finding no errors in the record, the judgment of the court below is affirmed.<sup>1</sup>

### LYNCH v. FREELAND.

COURT OF APPEALS OF KENTUCKY. 1803.

[Reported *Sneed*, 269.]

It is assigned as an error in this suit that "the writ and declaration are in case, and the verdict and judgment are in debt."

The court finds that the writ is trespass on the case in the usual form; and the declaration also seems to be in case, although it is not altogether in the usual form, and, perhaps, is deficient in substance. It is at least certain that it is not a declaration in debt. But the verdict and judgment could only have been authorized by a declaration in debt. In particular, the judgment is for a certain sum and interest thereon from the time it became due until paid, whereas, in an action on the case, the verdict and judgment could only have been for an aggregate sum in damages, including interest, until the time they were rendered, and not for any interest thereafter. Therefore, it is considered by the court that the judgment aforesaid be reversed and set aside, the cause be remanded to the circuit court for new proceedings to be had, to commence by amending the declaration, and the plaintiff recover of the defendant his costs in this behalf expended, which is ordered to be certified to the circuit court.<sup>2</sup>

<sup>1</sup> As to the necessity of designating the parties for and against whom judgment is rendered, see 1 Black, Judgments, 2d ed., sec. 116; 1 Freeman, Judgments, 4th ed., sec. 50a; 11 Encyc. of Pl. & Pr. 948.

As to the necessity of designating property which is the subject of a judgment, see *De Sepulveda v. Baugh*, 74 Cal. 468, 5 Am. St. Rep. 455; *Rosenthal v. Matthews*, 100 Cal. 81, 34 Pac. 624; *Coleman v. Reel*, 75 Ia. 304, 39 N. W. 510, 9 Am. St. Rep. 484; 1 Black, Judgments, 2d ed., sec. 117; 1 Freeman, Judgments, 4th ed., sec. 50c. — Ed.

<sup>2</sup> As to the necessity of conformity of the judgment to the pleadings, see *Reynolds v. Stockton*, 140 U. S. 254, 35 L. ed. 464, 11 S. Ct. 773; *Sache v.*

## GROSVENOR v. DANFORTH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1819.

[Reported 16 *Massachusetts*, 74.]

THIS was a writ of error, brought to reverse a judgment of the Court of Common Pleas for this county, rendered in an action of assumpsit, wherein the said Danforth was original plaintiff, and the said Grosvenor was original defendant.<sup>1</sup> . . .

The error relied on was that judgment was rendered for 54 dollars 19 cents, damage, although the *ad damnum* in the original writ was twenty dollars only; and for this the former judgment was reversed.<sup>2</sup>

## PICKWOOD v. WRIGHT.

COMMON PLEAS. 1791.

[Reported 1 *Henry Blackstone*, 642.]

IN this action of assumpsit the plaintiff took a verdict for 611 *l.* which was really the sum due to him, and entered up judgment for that sum besides costs, but the damages laid in the declaration were but 600 *l.* A writ of error was brought on this judgment, and *Kerby*, Serjt. obtained a rule to show cause why a *remittitur* of the 11 *l.* should not be entered. *Adair* and *Le Blanc*, Serjts. argued against the rule, saying, that after judgment signed and error brought, it was too late to enter a *remittitur* for the sum which caused the error; and they cited the case of *Sandiford v. Bean*, B. R. Hil. 13 Geo. 3, as an authority in point. *Kerby*, on the other side, insisted, that as long as the record remained in court it might be amended.

THE COURT thought it was reasonable to allow the amendment, and therefore made the rule absolute upon payment of the costs of the writ of error.

Wallace, 101 Minn. 169, 112 N. W. 386, 11 L. R. A. (N. S.), 803, 118 Am. St. Rep. 612; *Munday v. Vail*, 34 N. J. L. 418; 11 Encyc. of Pl. & Pr. 868. — Ed.

<sup>1</sup> A part of the case is omitted. — Ed.

<sup>2</sup> See *Safford v. Weare*, 142 Mass. 231, 7 N. E. 730; 1 Black, Judgments, 2d ed., sec. 138; 11 Encyc. of Pl. & Pr. 899. — Ed.



LABAHN BRICK CO. *v.* HECHT, impleaded with  
LEAFGREEN CONSTRUCTION COMPANY.

APPELLATE COURT OF ILLINOIS. 1912.

[Reported 169 *Illinois Appellate Court Reports*, 447.]

SMITH, J.<sup>1</sup> The appellee brought suit against the Leafgreen Construction Co. and Albert S. Hecht in the Municipal Court of Chicago on a note for the sum of \$2,000, bearing interest at the rate of six per cent per annum, dated July 27, 1908, payable thirty days after date to the Leafgreen Construction Co., and by it endorsed, signed by Albert S. Hecht. The defendants were duly served. The Leafgreen Construction Co. did not appear and default was entered against it. Mr. Hecht appeared and contested the suit. The issues were submitted to a jury and the jury found for the plaintiff and assessed his damages at the sum of \$2,102; judgment was entered on the verdict against both defendants and Mr. Hecht appealed. . . .

It is urged that the *ad damnum* being for \$2,100, it was error to enter judgment for \$2,102. It is true that the entering of the judgment for a larger sum than the *ad damnum* was error, but the appellee having filed a *remittitur* in this Court of two dollars, it is ordered that the *remittitur* of the sum in excess of \$2,100 be allowed. *Winslow v. People*, 117 Ill. 152. We also think that the maxim *de minimis non curat lex* applies to this error. *Village of Morgan Park v. Knopf*, 210 Ill. 453; *Rolsch v. Young*, 111 Ill. App. 34; *Underwood v. Whiteside Co. Bldg. & Loan Association*, 115 Ill. App. 387; *Spinner v. Roney*, 122 Ill. App. 19.

We are of the opinion that the other errors argued are untenable and need no mention. The judgment is affirmed. *Affirmed*.<sup>2</sup>

TAYLOR *v.* JONES.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE. 1860.

[Reported 42 *New Hampshire*, 25.]

TRESPASS, for taking sundry articles of personal property, of the alleged value of \$254.50, in the city of New York, and converting the same to the defendant's use, to the damage of the plaintiff the

<sup>1</sup> A part of the opinion is omitted. — Ed.

<sup>2</sup> See *Hemmenway v. Hickes*, 4 Pick. (Mass.), 497; *Herbert v. Hardenbergh*, 5 Halst. (N. J.), 222. — Ed.

sum of \$300. Plea, the general issue. The plaintiff's writ was dated June 7, 1859. . . .

The jury having returned their verdict for \$500, the plaintiff moved to amend his writ, by increasing the *ad damnum*. The court allowed this amendment against the objection of the defendant.

FOWLER, J.<sup>1</sup> . . . From a careful comparison of the various authorities, we are satisfied that the reasonable rule, in relation to amendments after verdict, and one which reconciles most, if not all of the numerous decisions, would be, that where the verdict is for a sum larger than the *ad damnum*, the difficulty may always be remedied by entering a *remittitur* for the excess; that the *ad damnum* may be amended after verdict, when it is apparent from the declaration itself that it was left blank, or too small a sum inserted, through mistake or inadvertence only; that if there has been a full and fair trial on the merits appearing on the face of the declaration, without any knowledge by either party of the defect, judgment may be rendered without a new trial; but that, if it does not appear that the defendant had no knowledge of the defect, the amendment may be made, but a new trial must be granted, to give him an opportunity to contest the enlarged demand; that, in actions sounding in damages only, where the plaintiff deliberately estimates the injury to himself, and there is only a difference in judgment between the jury and himself, as to the nature, extent and aggravation of the injury, no amendment increasing the *ad damnum* to cover the verdict will be allowed, and the only remedy for an excessive verdict is a *remittitur*; yet, that the court, in their discretion, may allow the *ad damnum* to be increased, in any case, where, after a full and fair trial upon the merits, the defendant claims and insists upon an appeal or review. Howe's Pr. 305; Hoit v. Molony, 2 N. H. 322; Dawkes v. Pilfield, Cro. Jac. 297; Pilford's Case, 10 Coke 115; Chewly v. Morris, 2 W. Bl. 1300; Curtiss v. Lawrence, 17 Johns. 111; Tidd's Pr. 653; Tomlinson v. Blacksmith, 7 D. & E. 132; Pearse v. Cameron, 1 M. & Sel. 675; Bogart v. McDonald, 2 Johns. Cases 219; Scutt v. Woodward, 1 H. Bl. 238; Wilder v. Hendy, 2 Str. 1151; Marshall v. Riggs, 2 Str. 1162; Livingston v. Rogers, 1 Caines 584, 588; Usher v. Dansey, 4 M. & S. 94; Perseval v. Spenser, Yelv. 45; McLellan v. Crofton, 6 Greenl. 307; Hutchinson v. Crosser, 10 Mass. 251; Whittier v. Varney, 10 N. H.

<sup>1</sup> A part of the statement of facts and a part of the opinion are omitted. — Ed.

291: *Green v. Bennet*, 1 D. & E. 782; *Danielson v. Andrews*, 1 Pick. 156.

With these views, the verdict must be set aside, and  
*A new trial granted.*<sup>1</sup>

### PHARIS *v.* GERE.

SUPREME COURT OF NEW YORK, GENERAL TERM. 1884.

[Reported 31 *Hun*, 443.]

APPEAL from an order made at the Onondaga Circuit and Special Term, denying the plaintiff's motion to amend the complaint herein after verdict, by increasing the claim for damages therein to correspond with the verdict, and refusing to allow the plaintiff to treble the damages found by the jury, except upon the condition that he remit the excess beyond the amount of the verdict and interest thereon from the time it was rendered. . . .

SMITH, P. J. It has long been settled that the court will not amend the complaint after verdict by increasing the amount of damages for which judgment is demanded, without setting aside the verdict and granting a new trial, to give the defendant an opportunity to defend against the enlarged claim. Accordingly in all actions for the recovery of damages, whether sounding in tort or on contract, the sum in the conclusion of the declaration or complaint must be sufficient to cover the real demand, and it would be unjust to allow it to be enlarged after verdict without granting a new trial, as the defendant may have gone to trial relying that no more damages than the sum claimed could be recovered against him. *Pilford's case*, 10 Co., 117 *a, b*; *Tomlinson v. Blacksmith*, 7 T. R., 128; 1 Ch. Pl. [14th Am. ed.], 339, 418; *Curtiss v. Lawrence*, 17 Johns., 111; *Dox v. Dey*, 3 Wend., 356; *Fish v. Dodge*, 4 Den., 311; *Corning v. Corning*, 2 Seld., 97; *Coulter v. Express Company*, 5 Lans., 67; *Decker v. Parsons*, 11 *Hun*, 295. The Code has not changed the rule. *Corning v. Corning*; *Decker v. Parsons*, *supra*.

The complaint in this action contained two counts: the first charged a forcible entry and detainer upon lands of the plaintiff to his damage of \$3,000, and alleged that thereby "the defendant by force of section four of the statute of 'trespass on lands' forfeited and became liable to pay treble the amount of said damages," and the same count concluded by a demand of judgment for the sum of

<sup>1</sup> See 1 *Encyc. of Pl. & Pr.* 586. — Ed.

\$3,000 besides costs. The second count alleged a forcible detainer of the same lands to the plaintiff's damage of \$3,000. The complaint concluded as follows: "Wherefore, on account of the foregoing premises, said plaintiff demands judgment against said defendant in the sum of \$3,000, besides costs of this action." At the trial the court instructed the jury that they had nothing to do with the question of treble damages, but that was for the court alone, and they were only to find the actual damages, if any, sustained by the plaintiff. The jury by their verdict found, under the first count, that there was a forcible detainer, and found for the plaintiff in the sum of \$2,250. Thereupon the plaintiff moved to amend the complaint by increasing the amount claimed in the prayer thereof from \$3,000 to \$7,000, and that the amount of damages found by the jury be trebled. The court denied the motion to amend, but gave the plaintiff leave to enter an order multiplying the amount of damages found by the jury by three, upon his filing a stipulation remitting all of said sum so resulting in excess of \$3,000 and interest thereon from the date of the verdict, and to enter a judgment for said sum of \$3,000 with interest, and no more.

The order was strictly in accordance with the rule and practice of the court above stated. The complaint claimed only \$3,000 damages. The fact that the first count alleged that the defendant had become liable to pay treble damages, did not enlarge the claim for damages made at the conclusion of that count and at the conclusion of the complaint. The plaintiff having limited his claim for damages to the sum of \$3,000, could not take judgment for any greater sum, either as single or treble damages.

The motion to amend was properly denied. So far as appears, the plaintiff asked to be allowed to amend unconditionally and not upon the usual terms of paying costs and taking a new trial.

The order should be affirmed, with ten dollars costs and disbursements.

HARDIN and BARKER, JJ., concurred.

*So ordered.*<sup>1</sup>

<sup>1</sup> The New York Code of Civil Procedure, sec. 1207, provides that "when there is no answer, the judgment shall not be more favorable to the plaintiff, than that demanded in the complaint. Where there is an answer, the court may permit the plaintiff to take any judgment, consistent with the case made by the complaint, and embraced within the issue." See *Bradley v. Shafer*, 64 Hun (N. Y.), 428; *Arrigo v. Calalno*, 7 N. Y. Misc. 515, 27 N. Y. Supp. 995; *Nichols & Shepard Co. v. Wiedemann*, 72 Minn. 344, 75 N. W. 208, 76 N. W. 41; *Ereck v. Omaha Nat. Bank*, 43 Neb. 613, 62 N. W. 67. — ED.



BROWN *v.* McLEISH *et al.*

SUPREME COURT OF IOWA. 1887.

[Reported 71 *Iowa*, 381.]

ACTION to recover damages for personal injuries sustained by plaintiff by falling into a ditch dug by defendants in a public street. There was a judgment upon a verdict for plaintiff. Both parties appeal.

BECK, J.<sup>1</sup> . . . The verdict was for \$1,500. This the district court reduced to \$1,200, and rendered judgment for that sum. From this ruling the plaintiff appeals. It is plainly erroneous, the district court having no authority to render judgment for a less amount than the verdict.

The judgment is reversed upon both appeals, and is remanded to the court below for a new trial. *Reversed.*

BUCK *v.* LITTLE and NANCE, use, etc.HIGH COURT OF ERRORS AND APPEALS OF MISSISSIPPI.  
1852.[Reported 24 *Mississippi*, 463.]

YERGER, J. This was an action of assumpsit against the drawer of an inland bill of exchange. The bill was not protested; but it was proved that it was drawn without authority, and that the drawer had no right to expect that it would be accepted or paid. On this evidence, the jury found a verdict against the defendant for the principal and interest of the bill. This verdict was right. It appears from a bill of exceptions, that after the verdict, upon motion of the plaintiff, the court added five per cent to the amount of the verdict, and gave judgment for the amount of the verdict, and the five per cent additional. This was erroneous, even if it were true, as contended for by the counsel for defendant in error, that by virtue of the act of May 11th, 1837, Huteh. Code, art. 5, 642, the plaintiff had a right to five per cent damages on the bill of exchange. Yet as the jury had found a verdict for a specific sum of money, it was not competent for the court to render a judgment for any greater amount. All that the court in such cases was authorized to have done, was to have set the verdict aside and given

<sup>1</sup> Only a part of the opinion is given. — Ed.

the plaintiff a new trial. In adding to the amount of the verdict, the court was assuming the province of the jury.

But the provisions of the statute before referred to, by no means warranted the court or jury in allowing the plaintiff five per cent damages. The right to recover damages on inland bills did not exist at common law. It exists alone by statutory provision, and that provision only extends, in the language of the statute, to "domestic or inland bills which shall be protested for non-payment." As the bill of exchange in this case was not protested, it did not come within the foregoing provision. The judgment of the circuit court must, therefore, be reversed. But as the defendant in error proposes to remit the excess in the amount of the judgment, we will render the judgment in this court, which the court below should have rendered. The case of *Anderson v. Tarpley*, 6 S. & M. 507, warrants us in so doing. The judgment of the circuit court of Holmes county is reversed, and judgment rendered here for the amount of the verdict rendered by the jury, with interest thereon from the date of the verdict. Defendant in error will pay the costs in this court.<sup>1</sup>

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## SECTION II.

### *Rendition and Entry.*

CRAWFORD, FLINN, and BRENNER v. BEARD and  
BEARD.

SUPREME COURT OF OREGON. 1885.

[Reported 12 *Oregon*, 447.]

THAYER, J.<sup>2</sup> This is an appeal from a decree rendered by the Circuit Court for the county of Linn, in a suit brought by the said respondents against the said appellants, to subject certain real property to the payment of three several judgments obtained by the said respondents severally against the appellant John Beard, in actions at law in said Circuit Court. . . .

Two of the said judgments were obtained by default, and entered by the clerk of said Circuit Court in vacation, without any order of the court, and the third was entered by the said clerk upon confession. The appellants' counsel deny the validity of said judg-

<sup>1</sup> As to the necessity of conformity of the judgment to the verdict or findings, see 11 *Encyc. of Pl. & Pr.* 904. — ED.

<sup>2</sup> A part of the opinion is omitted. — ED.

ments, and claim that the statute authorizing a judgment to be entered in such a case is unconstitutional. . . .

The view I am inclined to adopt in adjusting the rights of the parties to the controversy, renders it necessary to consider first the question as to the validity of the alleged judgment against John Beard. It is contended upon the part of the appellants that the entry of judgment by default or upon confession, involves the exercise of judicial power, and that, as all judicial power in this State is required to be vested in certain courts, the legislature had no authority to confer any such power upon the clerk. The decisions of other courts under similar provisions of statute or organic restrictions are conflicting. The point of difference between them is a disagreement as to whether such entry is a judicial or ministerial act. If I were required to decide the abstract question I should be very much inclined to hold that the rendition of judgment, in all cases, was a judicial act. The mere entry of judgment, no doubt, is a ministerial duty, but it seems to me that before such entry can be made there must be an adjudication either that the facts admitted, or the confession and statement in the particular case, entitle the party to a judgment. But our statute upon the subject has been in force for nearly twenty years. It may be said to have been acquiesced in by the bar, and it has tacitly been upheld by the courts. It has become a rule of practice, and if pronounced invalid now would cause disturbance of property rights, and occasion great mischief. When an act of the legislature has been so long recognized as binding, and important affairs of the community affecting individual rights have been transacted in accordance with its provisions, it should not be disturbed unless it plainly and unequivocally conflicts with the organic law. An act which has been sanctioned by the community ought not to be declared unconstitutional by the courts, when the question is in any degree doubtful. Whatever, therefore, my own private notions upon the subject are, so long as I am not positively certain of their correctness, I feel constrained to hold that such judgments are valid.<sup>1</sup> . . .

The chief justice is of the opinion that the statute conferring upon clerks power to enter a judgment in such a case is unconstitutional and void, and that the maxim *communis error facit jus* is inapplicable. *Pease v. Peck*, 18 How. 597.

<sup>1</sup> *Talbot v. Garretson*, 31 Ore. 256, 49 Pac. 978, *accord.* — Ed.

H. GUND & COMPANY v. HARRIGAN *et al.*

SUPREME COURT OF NEBRASKA. 1898.

[Reported 53 *Nebraska*, 794.]

ERROR from the district court of Adams county. Tried below before BEALL, J. *Affirmed.*

RYAN, C. This action was begun in the district court of Adams county to subject to the payment of a judgment certain real property claimed by William and Catherine Harrigan as a homestead. On January 19, 1893, there was a trial, resulting in findings of certain facts, among which were the findings that William and Catherine Harrigan had a homestead interest in the real property, subject and second to a mortgage of \$1,400 and accrued interest thereon; that a conveyance of William and Catherine Harrigan to their co-defendant, Peter Harrigan, was in fact and law a mortgage, which was subject and inferior to the claim of plaintiff, H. Gund & Co., and not a lien upon the premises. While these findings were followed by an order directing that judgment be entered upon them, there seems to have been no such judgment rendered at that time. On May 16, 1894, there was filed in this case a paper, which, though more pretentious in its designation and scope, may be treated as a motion for an entry of judgment *nunc pro tunc*. Notice of the pendency of this application was served on the attorneys for Gund & Co., by whom a special appearance was filed July 2, 1894, objecting to the jurisdiction of the court for the reason that no summons had been served on their client, and for the further reason that the court had lost jurisdiction of this case. On July 3, 1894, the record discloses that the cause was submitted to the court upon the evidence, oral, written, and documentary, which had been under consideration originally, and that the court thereon made a finding that the property was of the value of \$3,400, and that because of the mortgage thereon of \$1,400 there was no balance above the homestead exemption subject to the judgment in favor of H. Gund & Co. There was thereupon entered a decree that the judgment in favor of H. Gund & Co. was not a lien on the premises, and the homestead rights of William and Catherine Harrigan were quieted against said judgment. In *Van Etten v. Test*, 49 Neb. 725, it has been held that where, in fact, a judgment was rendered but not recorded, the court, at any time afterward, had power, independently of statutory authority, *nunc pro tunc*, to enter a proper judgment against



the defendant upon due showing in a proper proceeding. The facts in this case justified the entry of a judgment *nunc pro tunc*, and in legal effect there was but the entry of such a judgment. There has been pointed out no irregularity in the exercise of this power, and we therefore conclude that no such irregularity exists. The judgment of the district court is accordingly *Affirmed*.<sup>1</sup>

## CURRIER v. THE INHABITANTS OF LOWELL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1834.

[Reported 16 *Pickering*, 170.]

THIS was an action on the case upon St. 1786, c. 81, to recover double damages for injuries sustained by the plaintiff in consequence of being precipitated into an excavation, while travelling on a public highway in Lowell. . . .

A verdict was returned by the jury, for the plaintiff.

The defendants moved for a new trial, because the instruction to the jury was erroneous in point of law.

At the present term of the Court, the death of the plaintiff, on Saturday, after the commencement of the term, having been suggested, it was moved by the counsel for the defendants, that the action should be dismissed. The counsel who were for the plaintiff contended, that judgment should be entered up as of some day of this term before his decease. . . .

PUTNAM, J., delivered the opinion of the Court.<sup>2</sup> In regard to the motion of the defendant to dismiss the action, on account of the death of the plaintiff, we think that the law upon this subject is well stated in Tidd's Pract. (1st Am. edit.) 846. "If either party after verdict, had died in vacation, judgment might have been entered that vacation, as of the preceding term, and it would have been a good judgment at common law, as of the preceding term; though it would not be so upon the statute

<sup>1</sup> See *Creed v. Marshall*, 160 N. C. 394, 76 S. E. 270; 18 *Encyc. of Pl. & Pr.* 458.

But entry *nunc pro tunc* will not be allowed to prejudice a third party who has become owner of the property affected by the judgment, in reliance on the record. *Clark & Leonard Inv. Co. v. Rich*, 81 Neb. 312, 115 N. W. 1084, 15 L. R. A. (S. 2.), 682; 1 *Freeman, Judgments*, 4th ed., sec. 66. — Ed.

<sup>2</sup> The statement of facts is abridged and a part of the opinion in which it was held that the instruction was correct, is omitted. — Ed.

of frauds in respect of purchasers, but from the signing. And if either party die after a special verdict, and pending the time taken for argument or advising thereon, or on a motion in arrest of judgment, or for a new trial, judgment may be entered at common law after his death, as of the term in which the *postea* was returnable, or judgment would otherwise have been given *nunc pro tunc*; that the delay arising from the act of the court may not turn to the prejudice of the party." And although there can be no appearance for the party who has deceased, yet the court will hear from any one of its officers, as an *amicus curiae*, any suggestions as to the merits. *Ilsley's Case*, 1 Leon. 187. In *Oades v. Woodward*, 1 Salk. 87, the attorney for the plaintiff was permitted to enter the judgment as of a preceding term, although the party died in the vacation. The death of the party was not considered as a revocation of the power to confess the judgment. If the party died at the same term when the suggestion was made, the court would not take any notice of it, but proceed to enter up the judgment. And in that case the court entered up judgment in 22 Car. 2, as of Michaelmas term, 20 Car. 2, when the party who had died was in full life, the cause having been pending from that time, but no continuances having been entered. That proceeding was held to be well warranted by the common law and by statutes. *Crispe v. Jackson*, 1 Sid. 462.

The court will go back to the time when the judgment might have been rendered on the verdict, if no motion had been made which prevented it. *Tooker v. Duke of Beaufort*, 1 Burr. 147; *Mayor of Norwich v. Berry*, 4 Burr. 2277.

It was stated at the argument, that the plaintiff deceased on Saturday after the commencement of this term. And we are all of opinion, that the judgment may legally be rendered as upon some day of the term when he was in full life. . . .

*Judgment according to verdict.*<sup>1</sup>

<sup>1</sup> See *Stickney v. Davis*, 17 Pick. (Mass.), 169; *Wilkins v. Wainwright*, 173 Mass. 212, 53 N. E. 397; *Schaeffer v. Coldren*, 237 Pa. 77, 85 Atl. 98.

In *Clark & Leonard Investment Co. v. Rich*, 81 Neb. 321, 115 N. W. 1084, 15 L. R. A. (N.S.), 682, the court said: "There are two classes of cases in which it has been held proper to enter judgments and decrees *nunc pro tunc*. First, those cases in which the suitors have done all in their power to place the cause in a condition to be decided by the court, but in which, owing to the delay of the court, no final judgment has been entered. The second class embraces those cases in which judgment, though pronounced by the court, has from accident or mistake of the officers of the court never been entered on the court records. Where the case has been fully tried, and the court takes it under advisement,

## SECTION III.

*Judgments by Default.*ANDREWS *v.* BLAKE.

COMMON PLEAS. 1790.

[Reported 1 *Henry Blackstone*, 529.]

THIS was an action of *assumpsit* on a bill of exchange, in which the defendant let judgment go by default. In consequence of which a rule was granted to show cause why it should not be referred to the prothonotary to ascertain the damages and calculate interest on the bill, without a writ of inquiry. *Kerby*, Serjt. shewed cause, contending that the court could not dispense with a writ of inquiry in an action of damages; and he stated the principle to be, that the intervention of a jury was necessary in all cases, where the debt really due did not appear upon the face of the declaration.

*Lawrence*, Serjt. in support of the rule, relied on the case of *Rashleigh v. Salmon* (1 H. Bl. 252) where on a judgment by default on a promissory note, the same reference was made to the prothonotary as was desired in the present instance. THE COURT said, that as it would be the means of saving expence to the parties, as the amount of the bill appeared on the face of it, and the interest might be exactly calculated, they thought it right to make the rule absolute, which was accordingly done.<sup>1</sup>

during which one of the parties dies, a judgment will be entered *nunc pro tunc* as of the date of the case being submitted to the court, in order that no prejudice shall result on account of the death of the party, and the same rule obtains where a party is prevented from entering up a judgment on a verdict in his favor on account of a motion for a new trial, during the pendency of which the party dies. 1 *Freeman*, Judgments (4th ed.), sec. 58. *Den v. Tomlin*, 3 Har. (N. J.), 14, 35 Am. Dec. 525. A court which has ordered a judgment, which the clerk has failed or neglected to enter in the record, has power after the term at which it was rendered has passed to order the judgment so rendered to be entered *nunc pro tunc*, provided there be satisfactory evidence that the judgment was rendered as alleged, and of the nature and extent of the relief granted by it. 1 *Freeman*, Judgments (4th ed.), sec. 61." — Ed.

<sup>1</sup> *Cowles v. Cowles*, 121 N. C. 272, 28 S. E. 476, *accord.* — Ed.

## DISOSWAY v. EDWARDS.

SUPREME COURT OF NORTH CAROLINA. 1904.

[Reported 134 *North Carolina*, 254.]

ACTION by Mark Disosway against A. M. Edwards, heard by Judge Fred Moore at November Term, 1903, of the Superior Court of Craven County.

This is an action upon a bond executed by the defendant in the following words: "Know all men by these presents that I, A. M. Edwards, of Craven County, N. C., acknowledge myself indebted to Mark Disosway in the sum of one thousand dollars. The condition of this bond is such that if the said A. M. Edwards shall at any time, within the next twenty years from date hereof, engage in the sale of spirituous liquors, either directly or indirectly, within the limits of the city of New Bern, N. C., then this bond to be in full force and effect, and the said Mark Disosway, his heirs or assigns, in that case, is fully authorized hereby to at once take steps for the enforcement of this obligation, otherwise this bond to become null and void. A. M. Edwards, (Seal). Witness, R. B. Nixon."

The complaint alleges a breach in the bond, inasmuch as the defendant continues to engage in the sale of spirituous liquors in said city of New Bern, and further alleges in separate paragraphs that he is thereby "endamaged to the amount of one thousand dollars," and that "the defendant is indebted to him in the sum of one thousand dollars."

The defendant demurred upon the following grounds: "1. That the bond set out in the fourth paragraph of the complaint is in restraint of trade, tending to create a monopoly, contrary to public policy, null and void.

2. For that in any event such a bond could only be good to the extent of securing actual damage sustained, and the complaint does not set forth any fact from which the Court can see that the plaintiff has sustained any damage whatever."

Whereupon, judgment was rendered as follows: "This cause coming on to be heard upon the complaint of plaintiff and demurrer thereto filed by the defendant, and upon argument of counsel said demurrer being overruled and the defendant allowed to answer over, but, declining to answer, excepts to the order of the Court overruling said demurrer and appeals to the Supreme Court; it is thereupon ordered and adjudged that the plaintiff recover of the defendant the sum of one thousand dollars, upon the verified com-



plaint of the plaintiff, no answer being filed by the defendant, with interest until paid, and the costs of action."

DOUGLAS, J., after stating the case.<sup>1</sup> We think the demurrer was properly overruled on both grounds, but that there is error in the judgment in allowing the full amount of the bond in the absence of sufficient allegations in the complaint to enable the Court to hold as matter of law that the penalty of the bond is in the nature of stipulated or liquidated damages.

The plaintiff alleges that he is endamaged in the sum of one thousand dollars, and while this is not such a specific allegation of fact as is deemed admitted by demurrer, yet it is sufficient to entitle him to an inquiry as to his actual damages in view of the admission of his cause of action. It is not stated in the bond that it is intended to cover stipulated or liquidated damages, and while such an inference might be drawn from some of the attending circumstances, it is not sufficiently strong to overcome the general rule of interpretation. As the primary object of the allowance of damages is to recompense the plaintiff for the actual loss sustained from the injury, that is, to make him whole, courts are always inclined to construe a bond as penal in its nature, unless such a construction would tend to defeat its essential object. This is true even when it is expressly stated that the amount of the bond is intended as stipulated damages. There are cases where the full amount so stipulated is allowed, as, for instance, where it is extremely difficult or practically impossible to ascertain the actual damage; but even then we think that, to entitle the plaintiff to more than nominal damages, sufficient facts should appear, either by proof or admitted allegations, that some actual loss has been sustained, and that the amount of the bond is not unreasonable. These questions are fully discussed by this Court in *Lindsay v. Anesley*, 28 N. C., 186; *Thoroughgood v. Walker*, 47 N. C., 15; *Burrage v. Crump*, 48 N. C., 330; *Wheedon v. Trust Co.*, 128 N. C., 69. . . .

We are not inadvertent to the line of decisions distinguishing between ordinary contracts and those stipulating against carrying on a trade or business; but while in such cases the courts are more inclined to allow liquidated damages, yet in all cases the clear intention of the parties and the reasonableness of the amount must affirmatively appear to withdraw the case from the operation of the general rule.

<sup>1</sup> A part of the opinion is omitted. — Ed.

We are deciding the case as it is presented to us; but upon a trial on the merits it may be made to appear that liquidated damages were reasonably intended. We would suggest that both the plaintiff and the defendant be allowed to amend their pleadings so as fully to present the question at issue.

The defendant strenuously contends that the contract is against public policy as being in restraint of trade. We are not prepared to say that the contract is so unreasonable as to be void under our line of decisions, and we are not disposed to extend the rule in favor of the multiplication of saloons. The following cases from our own Reports may be taken as exemplifications of the general rule: *Baker v. Cordon*, 86 N. C., 116, 41 Am. Rep., 448; *Cowen v. Fairbrother*, 118 N. C., 406, 32 L. R. A., 829, 54 Am. St. Rep., 733; *Kramer v. Old*, 119 N. C., 1, 56 Am. St. Rep., 650, 34 L. R. A., 389; *King v. Fountain*, 126 N. C. 196; *Hauser v. Harding*, 126 N. C., 295; *Jolly v. Brady*, 127 N. C., 142. We think that this is a case which must be finally determined upon all the facts as they may be made to appear upon the trial of the issues.

*Error.*

## EAST INDIA COMPANY v. GLOVER.

NISI PRIUS. 1725.

[Reported 1 *Strange*, 612.]

THE plaintiffs declared upon a sale of coffee at so much per hundred, which the defendant was to take away by such a time, or answer in damages. There was judgment by default and on executing a writ of inquiry before Chief Justice Pratt at Guildhall, he refused to let the defendant in to give evidence of fraud on the side of the plaintiffs at the sale, because he said the defendant had admitted the contract to be as the plaintiff had declared, by suffering judgment by default, instead of pleading *non assumpsit*; and now they were only upon the *quantum* of damages.<sup>1</sup>

<sup>1</sup> See Ames, *Cases on Pleading*, ed. of 1905, 66. — ED.

## LEE v. KNAPP and others.

SUPREME COURT OF NORTH CAROLINA. 1884.

[Reported 90 *North Carolina*, 171.]

CIVIL ACTION tried at Spring Term, 1882, of Davidson Superior Court, before Avery, J.

The plaintiff in his complaint alleged that the defendants R. B. Knapp, William Overaker and J. W. Lingenfelter were indebted to the plaintiff in the sum of eleven hundred and sixty-four dollars and fifteen cents, due by account, and promised to pay the same, and that said account is for goods sold and delivered to the defendants during the years 1879 and 1880, and that no part thereof had been paid, and demanded judgment for the amount alleged to be due and for costs, &c.

Summons was served upon the defendants by publication, and at the return term, no answer having been filed, judgment by default and inquiry was rendered against the defendants for the want of an answer, and at the spring term, 1882, a jury was empaneled to inquire of the damages.

The plaintiff introduced one Overaker, who testified that he bought the articles set out in the complaint as agent of the defendants, and they were worth the amount charged.

The defendants, upon cross-examination of this witness, proposed to show by him "that the defendants organized as the Thomasville Gold and Silver Mining Company, and afterwards bought the articles as an incorporated company," and stated that they offered to prove this with a view of showing that the plaintiff was only entitled to recover nominal damages. The plaintiff objected to the evidence, the objection was sustained, and defendants excepted.

The defendants proposed to show further, by the same witness, that the defendant Lingenfelter was president of the company incorporated in the state of Pennsylvania, and that the defendant Knapp was treasurer and secretary, and that they as officers on behalf of said company gave instructions to the witness to buy the goods, with the view of taking the position (if true) that the defendants were only liable for nominal damages. Objection by the plaintiff was sustained, and the defendants excepted.

The plaintiff then introduced as a witness his clerk, who had made out the account sued on, and who testified that it was correct, and the defendant Knapp, with the defendant Overaker, came

into the store and told witness to let said Overaker have whatever he called for. Defendants' counsel then proposed to ask this witness "if he did not charge the articles in the books to the Eureka Mining Company, and if he did not understand that the articles were sold to the Eureka Mining Company when they were delivered — stating that the evidence was offered with the view (if true) of insisting that the plaintiff was only entitled to nominal damages." Objection by the plaintiff was sustained by the court, and the defendants excepted.

There was a verdict for the plaintiff for the amount claimed in the complaint. Judgment; appeal by defendants.

ASHE, J. The exceptions taken by the defendants to the ruling of His Honor in excluding the evidence offered by them were properly overruled by the court. The defendants proposed to prove that the articles alleged to have been purchased by them were not bought by them, but by one or the other of the two corporations, in one of which they held official positions. The evidence was of such a character that, if the facts proposed to be proved had been set up in an answer filed by them and sustained by proof, it would undoubtedly have defeated the plaintiff's action.

And it is settled that on an inquiry of damages upon a judgment by default, nothing that would have amounted to a plea in bar to the cause of action can be given in evidence to reduce the damages (*Garrard v. Dollar*, 4 Jones, 175), and the reason given for the rule is, that to allow such evidence after a judgment by default on an inquiry of damages, would take the plaintiff by surprise and prevent him from meeting the defendant upon equal terms with respect to the evidence, whereas when such defense is set up in the answer, the plaintiff has notice of the defense and may prepare to meet it.

The plaintiff alleged in his complaint that the goods mentioned therein were bought by the defendants, and the judgment by default admits all the material allegations properly set forth in the complaint, and of course everything essential to establish the right of the plaintiff to recover. Any testimony therefore tending to prove that no right of action existed against the defendants, or denying the cause of action, is irrelevant and inadmissible on the inquiry of damages. *Garrard v. Dollar*, *supra*.

In this case the action was in nature of assumpsit for goods sold and delivered, and the specific articles were not set forth in the complaint. The judgment by default admitted the plaintiff had cause of action against the defendants and would have been entitled to nominal damages without any proof; but in seeking



substantial damages, he was required to make proof of the delivery of the articles and their value. This the plaintiff did, and there was no competent evidence offered by the defendants to reduce the damages. The evidence offered by them only went to the cause of action, which being admitted by the judgment by default, the plaintiff was entitled to recover the value of the amount of goods proved to have been delivered. *Swepson v. Summey*, 64 N. C., 293; *Parker v. House*, 66 N. C., 374.

There is no error. The judgment of the superior court is affirmed.

*No error. Affirmed.*<sup>1</sup>

### HOPKINS *et al.* v. LADD.

SUPREME COURT OF ILLINOIS. 1864.

[Reported 35 *Illinois*, 178.]

APPEAL from the Circuit Court of Kendall county; the Hon. Madison E. Hollister, Judge, presiding. . . .

BREESE, J.<sup>2</sup> This was an action of debt on an ordinary replevin bond brought by the sheriff of Kendall county for the use of Ward against the obligors. The court gave judgment on the defendants' demurrer to the plaintiff's declaration for the amount of the penalty of the bond, and proceeded to assess the damages, whereupon the defendant objected to an assessment of damages without a jury. The court overruled the objection, to which the defendant excepted, and has brought the case here and assigns this as one of the principal errors.

By section 15 of the practice act, it is provided, in all cases where interlocutory judgment shall be given in any action brought upon a penal bond or upon any instrument of writing for the payment of money only, and the damages rest in computation, the court may refer it to the clerk to assess and report the damages, and may enter final judgment therefor without a writ of inquiry and without impanneling a jury for that purpose; and in all other actions where judgment shall go by default, the plaintiff may have his damages assessed by the jury in court. *Scates' Comp.* 261, 262.

This was the general law up to February 14, 1863, on which day the legislature passed this law: In all suits in the courts of record

<sup>1</sup> Compare *Martin v. N. Y. & N. E. R. R. Co.*, 62 Conn. 331, 25 Atl. 239; *Cook v. Skelton*, 20 Ill. 107. — Ed.

<sup>2</sup> The statement of facts and a part of the opinion are omitted. — Ed.

of this State upon default, where a writ of inquiry has heretofore been required to assess the damages, it shall be lawful for the court to hear the evidence and assess the damages without a jury for that purpose; provided that, if either party shall claim a jury, the damages shall be assessed as heretofore. Sess. Laws of 1863, p. 47.

But it will be observed that in 1857, a special law applicable to the thirteenth judicial circuit was passed, authorizing the court without a jury, to assess damages in all cases of default. Scates' Comp. 637; and by an act passed February 18, 1859, it was provided that the practice in the Circuit Court of Kendall county, should be the same in all respects as that in the thirteenth judicial circuit. Session Laws, 1859, page 58. This is a mere matter of practice, none will deny, and being so, the assessment of damages could be made by the court without a jury. The idea that a party has a constitutional right to have a trial by jury is not controverted. Here was no trial in any sense of that term. The defendant has declined putting his case on trial by abiding the judgment on the demurrer. The inquiry afterwards involved no consideration of any right of the defendant. His position was fixed by the judgment on the demurrer, no issue of fact was presented. The law of 1859 conferred on the Circuit Court of Kendall county full authority to assess the damages even against the defendant's objections, and there was no error in that respect. . . .

*Judgment affirmed.*

RAYMOND v. THE DANBURY & NORWALK RAIL-  
ROAD COMPANY.

CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF  
CONNECTICUT. 1877.

[Reported 43 *Connecticut*, 596.]<sup>1</sup>

TRESPASS ON THE CASE: brought to the Circuit Court of the United States for the District of Connecticut. The defendants suffered a default, and the plaintiff moved for a hearing in damages before the jury. The motion was argued at the September Term, 1876, before Shipman, District Judge.

SHIPMAN, J.<sup>2</sup> This is an action of tort to recover damages for an injury to the plaintiff, arising from the negligence of the defend-

<sup>1</sup> Reported also Fed. Cas. No. 11593, 14 Blatchf. 133. — ED.

<sup>2</sup> A part of the opinion is omitted. — ED.

ants. The defendants have suffered a default, and have thereby admitted a cause of action as alleged, but not the alleged extent of the injury, and the question now before the court is as to the tribunal by which the quantum of damages is to be ascertained. The plaintiff insists that he has a constitutional right to have the questions of fact in regard to damages determined by a jury, while the defendants assert that, in accordance with the practice of the state courts in Connecticut, the damages are to be assessed by the court.

The seventh amendment to the constitution of the United States provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." By the first clause of the amendment, the right of trial by jury, in common law actions, was guaranteed. The right and the same right of jury trial which then existed was to remain undisturbed. In some of the state constitutions the same idea is expressed by the phrase "shall remain inviolate."

By the common law, at the date of the adoption of the constitution, the trial of all issues of fact must be by a jury. By issues of fact are meant questions of fact, as distinguished from questions of law, which the result of the pleadings in each case shows to be in dispute or controversy between the parties, and a jury trial in issues of fact was the right of the litigant. In pursuance of the constitutional right guaranteed by the seventh amendment, Congress provided, in the twelfth section of the act of September 24th, 1789, that the trial of all issues of fact shall, in all suits, except those of equity and of admiralty or maritime jurisdiction, be by a jury.

But the assessment of damages upon a default, either in actions of tort or of contract, stood upon a different footing from the trial of issues of fact. In the early history of the common law the subject of the ascertainment of damages was in some confusion. The courts frequently fixed the amount of damages on a judgment by default and on demurrer. Rolle's Abridgment, tit. Damages. And "though the justices use to award inquest of damages, when they give judgment by default, yet they may give damages if they will." Sedgwick on Damages, 704; Viner, Abr., Damages I. Courts had also the right of revising the amount of damages which had been assessed upon a writ of inquiry.

In 1765, the date of the publication of the first volume of Blackstone's Commentaries, the practice had become settled that upon a default damages should be assessed upon a writ of inquiry by a sheriff's jury, but "a practice was established in the courts of King's Bench and Common Pleas, in actions where judgment is recovered by default upon a bill of exchange, or a promissory note, to refer it to the master or prothonotary, to ascertain what is due for principal, interest and costs, whose report supersedes the necessity of a writ of inquiry." 3 Black. Com., note on p. 397. In 1848, before the enactment of the statute of 15 and 16 Vict., in regard to the ascertainment of damages by a master in actions of contract, it is said, in *Whitaker v. Harold*, an action of covenant, 12 Jurist, 395, that the court of Queen's Bench had the power to assess damages on demurrer or default without the intervention of a jury.

The assessment of damages by a jury in actions of tort was however a matter of practice and not of right. Chief Justice Wilmot held in 1770, as had been previously declared in 1764, that a writ of inquiry, in an action of tort, is an inquest of office, to inform the conscience of the court, which could itself have assessed the damages, without any inquest. *Beardmore v. Carrington*, 2 Wils., 244; *Bruce v. Rawlins*, 3 Wils., 61; 2 Finlason's Reeves's History of English Law, 610. . . .

The practice in this state at the date of the adoption of the constitution, in regard to the assessment of damages, is easily ascertained. Judge Swift, in his System, published in 1796, says: — "Our courts possess the same power to assess damages as a jury in England, upon a writ of inquiry issued to the sheriff for that purpose. There, in these cases, the court must issue a writ to the sheriff, commanding him by twelve men to inquire into the damages and make return to the court, which process is called a writ of inquiry. The sheriff sits as judge, and there is a regular trial by twelve jurors to assess the damages. This mode of proceeding must be productive of expense and delay, and the practice of this state, introduced by our courts without the authority of a statute, of assessing the damages themselves, without the intervention of a jury, is one of the many instances in which we have improved upon the common law of England." 2 Swift's System, 268. This practice of the courts was afterwards sanctioned by statute (Revision of 1821, sect. 59, p. 50), and has remained the law of the state ever since.



The practice of the United States courts in the different circuits has not been uniform. The more common method has been to assess damages by a jury, upon a writ of inquiry, but it is believed that the practice has conformed to the usage of the state in which the Circuit Court was held. 2 Abbott's Practice, 50. In this district, neither the custom of calling in a marshal's jury to assess damages, nor the assessment by a petit jury under the direction of the court, has prevailed.

The conclusion is, that the assessment of damages by a jury upon a default is matter of practice and not of right; and that the assessment should be made in this case according to the uniform practice of the state courts.

Let the damages be assessed by the court, or if the parties agree, by the clerk, as committee to find and report the facts and the amount of damages.<sup>1</sup>

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#### SECTION IV.

##### *Judgments by Confession.*

HAZEL, Assignee of MONCUR, *v.* JACOBS.

COURT OF ERRORS AND APPEALS OF NEW JERSEY. 1910.

[Reported 78 *New Jersey Law*, 459.]

REED, J. This writ brings up a judgment entered upon a finding of the trial judge sitting without a jury. The action was brought in the Cumberland County Circuit Court and resulted in a judgment for the plaintiff. The action below was brought to recover the amount of a judgment entered upon a promissory note before a justice of the peace in the State of Delaware, which judgment was duly docketed in the Superior Court of said state at Dover, in the county of Kent.

The note upon which the judgment was entered was given to one Frank Moncur, and by him assigned to William B. Hazel, who caused the judgment below to be thereafter entered. The judgment was entered by virtue of a warrant of attorney, and the following is a copy of the note and the warrant:

"I, George W. Jacobs, promise and oblige myself, my heirs, executors or administrators, to pay Frank Moneur, his executors,

<sup>1</sup> Central, etc., R. R. Co. *v.* Morris, 68 Tex. 49, 3 S. W. 457, *contra*. See 20 L. R. A. (N. S.), 1; 24 Cyc. 140. — Ed.

administrators, or assigns, the sum of seventy dollars (\$70.00) lawful money of the State of Delaware with lawful interest, for value received, on or before the first day of November, A.D. 1889.

"And further, I do hereby authorize and empower any justice of the peace within the State of Delaware or elsewhere to enter judgment on the above obligation without process, against me, my heirs, executors or administrators, at the suit of the said Frank Moncur, his executors, administrators or assigns, at any time after the date hereof, with stay of execution till the first day of November, A.D. 1889, and I do hereby release all and all manner of error or errors in any such judgment and in the execution to be issued thereon.

"In witness whereof, I have hereunto set my hand and seal this first day of May, A.D. one thousand eight hundred and eighty-nine.

"GEORGE W. JACOBS. [*Seal.*]

"Signed, sealed and delivered in the presence of

"GEORGE N. DONNELLY."

The entry of judgment is in the following form:

"Jan. 31, 1901.

"Action of debt on specialty  
459. William B. Hazel, with warrant of attorney to enter  
Assignee of Frank Moncur, judgment against this defendant  
v. without process and release of error  
George W. Jacobs. for \$70.00, int. from Nov. 1, 1889.

"And now, to wit, this 31st day of January, A.D. 1901, the note with warrant of attorney is received and filed and thereupon judgment is hereby given in favor of said plaintiff, and against George W. Jacobs, defendant, for seventy dollars, with interest, from November 1, A.D. 1889, and fifty cents costs.

"JOHN B. HUTTON, J. P."

To the declaration upon this judgment the defendant pleaded payment of the judgment.<sup>1</sup> He also pleaded that he was never served with any process in the state in which the said judgment was obtained, and that he did not appear to the said suit in person or by attorney, and that he was not resident nor present within the jurisdiction of the said court in which said judgment was rendered, and that John B. Hutton, justice of the peace, and one J. H. Hughes, attorney-at-law, appeared for the defendant in the said suit and entered judgment against the defendant, but that neither was authorized by the defendant so to do.

<sup>1</sup> A part of the opinion, in which the court held that this defense was not available, is omitted. — Ed.

Upon the trial of the present action an exemplified copy of the Delaware judgment was put in evidence, also a copy of the statute of Delaware permitting the entry of such judgment by a justice of the peace upon warrant of attorney. It was also proved that Hazel was the holder by assignment of the note in question. . . .

The defect alleged is that there was an absence of jurisdiction over the defendant, Jacobs, in that there was no legal service of process upon him, and no appearances by him or by any attorney authorized to so appear. This raises the question whether a judgment entered without process or appearance, but entered in conformity with the authority given by a warrant of attorney executed by the defendant, confers jurisdiction upon a court to enter a judgment which is unassailable collaterally in both domestic and foreign jurisdictions.

It is not denied that the entry of the judgment by the justice of the peace in the State of Delaware was upon its face regular, and in conformity with the statutes of that state. It is not denied that the authority given by the warrant of attorney conferred upon the justice of the peace of the State of Delaware and elsewhere power to enter judgment upon the note without process. It cannot be denied that a party can waive his right to have a suit begun against him by process. *Crosby v. Washburn*, 37 Vroom 494.

Nor can it be denied that the warrant of attorney authorizing another to appear and enter judgment without process is a waiver of such right. In the words of Chief Justice Ruger, in delivering the opinion in the case of *Teel v. Yost*, 128 N. Y. 387: "That a power so conferred is the equivalent of process is entirely settled. In all cases where such an authority exists, it is simply a question as to what the principal has authorized to be done in his name, and does not involve any of the questions arising in an action *in invitum* against resident or non-resident defendants."

The courts of this state have recognized the conclusive character of foreign judgments entered without process, but upon the authorization of a warrant of attorney to appear for the defendant. *Hendrickson v. Fries*, 16 Vroom 555; *Schelmerdine v. Lippincott*, 40 Id. 82.

Both of these cases involved actions upon judgments so entered in the State of Pennsylvania.

The same rule prevails in Massachusetts, *Henry v. Estes*, 127 Mass. 474; *Van Norman v. Gordon*, 172 Id. 576.

So in the Federal Supreme Court it is regarded as settled that if the authority to enter a judgment is strictly pursued, the judgment is entitled to credit everywhere.

In *National Exchange Bank of Tiffin v. Wiley*, 195 U. S. 257, it was held that where a warrant authorized the entry of judgment in favor of the holder of a promissory note, it could be shown in an action upon the judgment elsewhere that appearance was by one not the holder, and in *Grover & Baker Co. v. Radcliffe*, 137 Id. 287, the judgment was held irregular because entered without the appearance of an attorney, when the power conferred was only that any attorney could enter judgment. Both of these cases assumed as a settled doctrine that where the authority conferred was strictly pursued, the judgment entered was entitled to full faith and credit in foreign jurisdictions.

The judgment in this case was entered by a justice of the peace, and the power was given to the justice of the peace to execute this judicial act. The want of process or of other appearance was waived.

The judgment below, therefore, in favor of the plaintiff for the amount of the judgment, should be affirmed.<sup>1</sup>

*For affirmance* — THE CHANCELLOR, CHIEF JUSTICE, GARRISON, SWAYZE, REED, TRENCHARD, PARKER, BERGEN, VOORHEES, MINTURN, BOGERT, VREDENBURGH, VROOM, GRAY, DILL, CONGDON, JJ. 16.

*For reversal.* None.

<sup>1</sup> *Van Norman v. Gordon*, 172 Mass. 576, 53 N. E. 267, 44 L. R. A. 840; *First National Bank v. Garland*, 109 Mich. 515, 67 N. W. 559, 33 L. R. A. 83; *Teel v. Yost*, 128 N. Y. 387, 28 N. E. 353, 13 L. R. A. 796, *accord*. See also *Cuykendall v. Doe*, 129 Ia. 453, 105 N. W. 698, 3 L. R. A. (N. S.), 449; 2 Black, *Judgments*, 2d ed., sec. 868; 2 Freeman, *Judgments*, 4th ed., sec. 558a; 23 Cyc. 699. Compare *Acme Food Co. v. Kirsch*, 166 Mich. 433, 131 N. W. 1123, 38 L. R. A. (N. S.), 814.

On the question of the validity at common law of a warrant of attorney to confess judgment, see *French v. Willer*, 126 Ill. 611, 18 N. E. 811, 2 L. R. A. 717, 9 Am. St. Rep. 884; *First Nat. Bank v. White*, 220 Mo. 717, 120 S. W. 36, 132 Am. St. Rep. 612, 16 Ann. Cas. 889; *A. B. Farquhar Co. v. Dehaven*, 70 W. Va. 738, 75 S. E. 65, 40 L. R. A. (N. S.), 956.

The judgment is not valid unless the authority in the power of attorney is strictly followed. *Grover & Baker Sewing Machine Co. v. Radcliffe*, 137 U. S. 287, 34 L. ed. 670, 11 S. Ct. 92; *In re Raymor's Estate*, 165 Mich. 259, 130 N. W. 263. Compare *Lea v. Yates*, 40 Ga. 56. — ED.



ELLIOT, LEE and others *v.* WOODHULL.

SUPREME COURT OF NEW JERSEY. 1830.

[Reported 7 *Halsted*, 126.]

*E. Vanarsdale*, moved to enter judgment in this case upon a *cognovit actionem* of the defendant, and stated that a *capias* had been regularly issued in this case, and served upon the defendant, and a declaration filed by the plaintiff. He said he did not consider this case as coming within the supplement to the act entitled, "An act directing the mode of entering judgments upon bonds with warrants of attorney to confess judgments," passed February 19th, 1829, and that the judgment might be entered without an affidavit of the plaintiff, stating that the debt "was justly and honestly due," &c. as required by that supplement. But to put an end to all doubt upon the subject, he had thought it prudent to present the question to the court.

BY THE COURT. — The case is not within the act of February 19th, 1829; therefore the judgment may be entered without the affidavit therein mentioned.<sup>1</sup>

KINDIG *v.* MARCH.

SUPREME COURT OF INDIANA. 1860.

[Reported 15 *Indiana*, 248.]

PERKINS, J. Kindig gave a power of attorney to Chamberlain, to confess a judgment in favor of March, for a debt due to him.

The power was duly executed and proved. We are satisfied of this from an examination of the record.

When judgment was about to be entered in execution of the power, Kindig presented to the Court a revocation of it, on

<sup>1</sup> In *French v. Willer*, 126 Ill. 611, 614, 18 N. E. 811, 2 L. R. A. 717, 9 Am. St. Rep. 884, the court said: "There were at common law, besides the judgment by default, two methods of obtaining judgment without trial. One by a confession of judgment under a warrant of attorney, and the other upon a *cognovit actionem*, signed by the defendant in the action. The warrant of attorney authorized the attorney named therein to appear for the defendant and receive a declaration in an action for debt, and to confess the action or suffer judgment by *nil dicit*, or otherwise, to pass. . . . The *cognovit actionem* was not an authority given before the action commenced, but was a confession signed by the defendant after the process was issued." See 11 *Encyc. of Pl. & Pr.* 973; 1 *Black, Judgments*, 2d ed., chap. III. — Ed.

the ground that it was for too large an amount. The Court disregarded the revocation, and directed the judgment to be entered.

A power of attorney to confess judgment is not revocable by act of the party. See Story on Agency, § 477; 2 Archbold's Pr. p. 21. But if any fact affecting its validity be alleged, the Court will permit an issue to be formed and tried, and act in the premises accordingly, annulling the warrant or reducing the amount of judgment upon it, as the case proved may require. In this case, the defendant may yet have the judgment corrected, on complaint filed and heard, as in other cases. Archbold, *supra*; 15 Petersdorf, pp. 366, 367, 368.

*Per Curiam.* — The appeal is dismissed, with costs.<sup>1</sup>

<sup>1</sup> See *Evans v. Fearne, Crenshaw & Co.*, 16 Ala. 689, 23 Cyc. 707. — Ed.

## CHAPTER XI.

### PROCEEDINGS IN THE TRIAL COURT AFTER JUDGMENT.

#### OBENCHAIN *v.* COMEGYS.

SUPREME COURT OF INDIANA. 1861.

[Reported 15 *Indiana*, 496.]

APPEAL from the Cass Common Pleas.

*Per Curiam.* Suit upon a note. Judgment by default. Application by the defendant to have the default set aside. The Court at first granted the application, but soon after reconsidered the matter, changed its judgment, and refused to set the judgment by default aside.

The records of the Court are within its control during the term, at least where all parties still remain in Court. The Court had power to change its determination on the point of opening the judgment. No abuse appears in this case. No such steps had been taken as precluded the Court from reconsidering its judgment. See *Boyd v. Blaisdell*, 15 Ind. p. 73.

The judgment is affirmed, with 5 per cent damages and costs.<sup>1</sup>

#### BROWN *v.* BARTLETT.

SUPREME COURT OF ALABAMA. 1841.

[Reported 2 *Alabama*, 29.]

THIS suit was commenced originally before a justice of the peace, by the defendant, against the plaintiff in error, in which the former obtained judgment and the latter removed it by *certiorari* to the County Court of Pike County. The counsel for one of the parties being appointed judge of the County Court, the cause was transferred to the Circuit Court of Pike county — and at the Spring term 1839, of that Court the cause was, by the judgment of the

<sup>1</sup> See 23 Cyc. §60.

"During the terme wherein any judiciall act is done, the record remaineth in the brest of the judges of the court, and in their remembrance, and therefore the roll is alterable during that terme, as the judges shull direct; but when the terme is past, then the record is in the roll, and admitteth no alteration, averment or proofe to the contrarie." Co. Litt. 260a. — Ed.

Court, dismissed at the cost of the plaintiff. At the Fall term, 1840, of the Court, the following entry appears, "ordered by the court that the judgment entered in this case at the Spring term of 1839, be so amended as to make the defendant liable for costs, for which execution may issue." There is also sent up with the record a transcript from the trial docket with the word "dismissed" opposite the case, and a certificate by the clerk that the word "dismissed" found on the trial docket, is in the hand writing of the presiding judge, and that no other memorandum or entry appears in relation to said cause. From the amended judgment the defendant below prosecutes this writ of error, and assigns that there was no authority to enter such judgment.

ORMOND, J. It is objected for the plaintiff in error, that no amendment can be made in a judgment after an interval of one term — such is not the law, the amendment may be made at any time if the evidence is in existence, which will authorize it to be done. In the case of *Goldthwaite v. Wilkerson* [1 Stewt. & Por. 159] an amendment of this kind was made after the lapse of seven years.

What evidence will be sufficient to authorize the amendment of a part of the record *nunc pro tunc*, is largely discussed in the case of *Moody v. Keenar*, 9th Porter, 252. In the case of *Thompson & Miller* [2d Stewart's Rep. 470] it was held that such an amendment could not be made on oral testimony, and was only authorized "when predicated on matters of record or some entry made by or under the authority of the Court."

If we were at liberty to notice the entry on the trial docket, which the clerk states was a memorandum of the presiding judge, (but which is no part of this record) it would not justify the amendment made in this case. The word "dismissed," if it indicates, as it must be held to do, the disposition made of the cause at the first trial, did not authorize the amendment, as the judgment entered at the trial term was in exact accordance with it. The cause could only have been dismissed by the plaintiff and at his own cost, unless by the agreement of the defendant, the costs were to be levied against him.

There does not appear therefore to have been any warrant for the amendment, none such appears in the record, and we cannot presume that any exists. Let the judgment of the Court, amending the previous judgment, be reversed.<sup>1</sup>

<sup>1</sup> See *Albers v. Whitney*, 1 Story (U. S.), 310; 1 Tidd, Practice, 9th ed., 713, 714. But see *Balch v. Shaw*, 7 Cush. (Mass.), 282; *Frink v. Frink*, 43 N. H.



DEKALB COUNTY *v.* HIXON *et al.*

SUPREME COURT OF MISSOURI. 1869.

[Reported 44 *Missouri*, 341.]

CURRIER, J. The question here raised relates to the authority of the Circuit Court in ordering amendments of its own records. In that court the plaintiff dismissed as to one of the defendants, and the court, at a subsequent term, on motion of the remaining defendants, dismissed the suit as to them. The amended transcript, brought into the District Court on *certiorari*, shows that when the court directed the dismissal it also ordered final judgment, which the clerk omitted to enter of record.

After an appeal, and while the cause was pending in the District Court, the Circuit Court ordered its records amended so as to show that a final judgment followed the order of dismissal; the record entry of the judgment being made *nunc pro tunc*. The defendants (plaintiffs in error) objected to this as unwarranted and beyond the jurisdiction of the court.

The objection is not well taken. The court had lost its jurisdiction of the case, but not of its records. It had authority, as well after as before the appeal, to amend its records according to the truth, so that they should accurately express the history of the proceedings which actually occurred prior to the appeal. *Welch v. Damon*, 11 Gray, 383; *Chichester v. Cande*, 3 Cow. 42, note *a*; *Mechanics' Bank v. Minthorne*, 19 Johns. 244; *Richardson v. Mellish*, 11 Eng. C. L. 173.

The collateral effects of such amendments, as regards liens and the rights of third parties, are not under consideration. *Ladd v. Couzins*, 35 Mo. 513, and *Stewart v. Stringer*, 41 Mo. 400, authorities relied upon by the defendants, are not in point. In these cases the things proposed to be done were rather additions to the proceedings than amendments of the records. The language of

508. Compare *Coughran v. Gutcheus*, 18 Ill. 390. See 1 Black, *Judgments*, 2d ed., sec. 165; 1 Freeman, *Judgments*, 4th ed., sec. 72.

In *Frink v. Frink*, 43 N. H. 508, 515, the court said: "We think it clear, upon the authorities, that the court may make such amendments upon any competent legal evidence, and that they are the proper judges as to the amount and kind of evidence requisite in each case to satisfy them what was the real order of the court, or the actual proceeding before it; what was the proper entry to be made on the docket, and how the record should be extended. Where there is nothing more to rely on than mere memory, the court will act if at all with great caution." — Ed.

the court is to be construed in connection with the facts of the respective cases to which that language was applied. The parties proposed to bring upon the record fresh facts — new proceedings, which had not been recorded because they had not occurred until after the appeal. In fine, they proposed to deal with the case, and the court below had ceased to have any jurisdiction over that.

The action of the District Court reversing the judgment of the Circuit Court is affirmed. The other judges concur.

RADCLYFFE v. BARTON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1891.

[Reported 154 *Massachusetts*, 157.]

WRIT OF ERROR, issued on January 6, 1889, to reverse a judgment rendered by the Superior Court at July term, 1879. Plea, *in nullo est erratum*.

The record of the action in which the judgment was rendered, transmitted by the Superior Court, showed that on June 11, 1878, an action of contract upon a promissory note for one thousand dollars, made by the plaintiff in error to the order of the defendant in error, was brought by the latter against the former, the *ad damnum* of the writ being laid at three hundred dollars; and that at the July term, 1878, judgment was rendered against the plaintiff in error on his default, and in favor of the defendant in error, in the sum of three hundred dollars, together with the costs of suit. At the July term, 1879, the defendant in error filed a motion in that court to vacate the judgment so rendered by default, bring the suit forward, and increase the *ad damnum* in the writ to fifteen hundred dollars. This motion was allowed on the day it was filed, and at the same time judgment was rendered in the case in favor of the defendant in error for \$1,116.73 damages, together with the costs of suit, on which execution was duly issued.

The assignment of errors recited, among other things, that the judgment was vacated, the action brought forward, and the *ad damnum* increased, and the new judgment rendered, without notice to the plaintiff in error of the motion filed by the defendant in error.

The case was submitted to this court on agreed facts, reciting that the transcript of the records of the Superior Court was correct, and that an action of contract had been brought upon the

judgment sought to be reversed within six years prior to suing out this writ of error, and waiving any assignment of error requiring other evidence.

ALLEN, J. The cause was finally disposed of by the entry of judgment for three hundred dollars on the default. There was no fraud nor error nor mistake in the entry of that judgment, as was the case in *Edson v. Edson*, 108 Mass. 590. *Stickney v. Davis*, 17 Pick. 169. *Capen v. Stoughton*, 16 Gray, 364. The term of court had closed. Several more terms had also passed. After all this, the court on a mere motion assumed to vacate the judgment, to bring forward the action, to allow an amendment increasing the *ad damnum*, and to enter judgment against the plaintiff in error for a larger sum. We need not consider whether it is to be presumed that notice of the motion was given to the plaintiff in error or not. In the assignment of errors he sets forth that no notice was given to him; but by his agreement he waives this. It would be more satisfactory to have had this fact proved, if it existed; but whether notice was given or not, it was not in the power of the court at that time to vacate the judgment on a mere motion. *Mason v. Pearson*, 118 Mass. 61. *Blanchard v. Ferdinand*, 132 Mass. 389. *Wood v. Payea*, 138 Mass. 61. *Pierce v. Lamper*, 141 Mass. 20. *Barnes v. Smith*, 104 Mass. 363. *Mortland v. Little*, 137 Mass. 339. See also *Dudley v. Keith*, 153 Mass. 104. We need not consider whether it might have been done on a formal petition, under the Pub. Sts. c. 187, § 17 (*Pierce v. Lamper, ubi supra*), or on a writ of review. Pub. Sts. c. 187, §§ 22, 25, 30, 35.<sup>1</sup>

The judgment for three hundred dollars was properly entered, and the plaintiff in error has no ground of complaint on that score. *Jarvis v. Blanchard*, 6 Mass. 4. *Storer v. White*, 7 Mass. 448. *Fairfield v. Burt*, 11 Pick. 244. That judgment therefore will stand, and the judgment subsequently entered must be reversed.

*Judgment reversed.*<sup>2</sup>

<sup>1</sup> See Mass. R. L., c. 193, secs. 14-37, for the present law of Massachusetts. — Ed.

<sup>2</sup> See *Pisa v. Rezek*, 206 Ill. 344, 69 N. E. 67; *Priest v. Axon*, 93 Me. 34, 44 Atl. 124; *Peake v. Redd*, 14 Mo. 79; *Moore v. Hinnant*, 90 N. C. 163; *May v. Stimson Lumber Co.*, 119 N. C. 96, 25 S. E. 721. — Ed.

CHAMBLEE *et al.* *v.* COLE.

SUPREME COURT OF ALABAMA. 1900.

[Reported 128 *Alabama*, 649.]

THIS was a proceeding by petition in the court below to vacate a decree of said court rendered at a former trial by which a homestead exemption was set apart to a widow and minor children before administration. The petition was filed by appellee, who alleges she is an heir at law of the decedent. It was alleged and the record in the probate court disclosed that the petition upon which the decree sought to be vacated was based, contained only the following allegation as to the real estate owned by the decedent at the time of his death, to-wit: "He owned, without any incumbrance, a plantation which does not exceed 160 acres, or two thousand dollars in value." Upon the hearing of this petition a decree was rendered vacating and annulling the former decree by which the homestead exemption was set apart. From this decree appellants appeal, and assign the rendition thereof as error.

TYSON, J. It is well settled that where a decree, void for want of jurisdiction, has been rendered, the court rendering it possesses the inherent power, and should on motion, vacate said decree. It is a nullity and the court may at any subsequent term vacate it. 3 Brick. Dig. 584, § 124. If not void, the court has no power to alter, vary or annul it after the expiration of the term at which it was rendered, except for clerical error or omission on evidence shown by the record. *Baker v. Barcliff*, 76 Ala. 414; *Buchanan v. Thomason*, 70 Ala. 401.

It is equally as well settled that where the court, whose jurisdiction is questioned, is one of limited jurisdiction, it must appear from the face of the proceedings that it has acted within the scope of its jurisdiction. In other words, no presumption is indulged, from the mere exercise of jurisdiction, of the existence of jurisdictional facts. They will not be inferred, but must affirmatively appear from the record. *Pettus v. McLannahan*, 52 Ala. 55; *Joiner v. Winston*, 68 Ala. 129. To quote the language to be found in *Robertson v. Bradford*, 70 Ala. 387: "Nothing is presumed to be within the jurisdiction of a court of limited jurisdiction except that which is so expressly alleged and affirmatively appears from the record."

The jurisdiction of the probate court to set apart to a widow and minor children exemptions before administration (Code, § 2097;



Code of 1886, § 2562, and Acts, 1886-87, p. 112), is conferred by statute alone and in the exercise of that jurisdiction it is a court of limited jurisdiction. It is necessary, therefore, that the jurisdictional facts affirmatively appear from the record.

The petition filed by the widow in this case, upon which the probate court acted and which is the basis of the decree entered by that court, is subject to the same infirmities as was the one in the case of *Brooks v. Johns*, Admr., 119 Ala. 412. On the authority of that case, the proceedings here involved, must be held to be void. Being void, the court committed no error in vacating them.

*Affirmed.*<sup>1</sup>

[Stephen, *Pleading*, Williston's edition, \*128-\*131.]

After final judgment is signed, the unsuccessful party may bring a *writ of error*; and this, if obtained and *allowed*, and if notice of the allowance be served before execution, suspends (generally speaking) the latter proceeding, till the former is determined. A writ of error is sued out of *Chancery*, directed to the judges of the court in which judgment was given, and commanding them, in some cases, themselves to examine the record; in others, to send it to another court of appellate jurisdiction, to be examined, in order that some alleged error in the proceedings may be corrected. The first form of writ, — called a writ of error *coram nobis* [or *vobis*] — is, where the alleged error consists of matter of *fact*; the second, — called a writ of error generally — where it consists of matter of *law*.

When a writ of error is obtained, the whole proceedings to final judgment inclusive are then always actually *entered* (if this has not before been done) on record; and the object of the writ of error is to reverse the judgment, for some *error of fact or law* that is supposed to exist in the proceedings *as so recorded*. It will be proper here to explain in what such error may consist.

Where an *issue in fact* has been decided, there is (as formerly observed) no appeal in the English law from its decision, except in the way of motion for new trial; and its being wrongly decided is not *error*, in that technical sense to which a writ of error refers. So, if a matter of fact should exist, which was not brought into issue, but which, if brought into issue, would have led to a different judgment, the existence of such fact does not, after judgment, amount to *error* in the proceedings. For example if the defendant has a release, but does not plead it in bar; its existence cannot,

<sup>1</sup> See *In re* College Street, 11 R. I. 472; 23 Cyc. 905. — Ed.

after judgment, on the ground of error or otherwise, in any manner be brought forward. But there are certain facts, which affect the *validity and regularity of the legal proceeding itself*; such as the defendants having, while *under age*, appeared in the suit by *attorney*, and not by *guardian*; or, the plaintiff's or defendant's having been a *married woman* when the suit was commenced. Such facts as these, however late discovered and alleged, are *errors in fact*, and sufficient to reverse the judgment upon writ of error. To such cases the writ of error *coram nobis* applies: "because the error in fact is not the error of the judges, and reversing it is not reversing their own judgment."<sup>1</sup>

## POWELL v. GOTT.

SUPREME COURT OF MISSOURI. 1850.

[Reported 13 *Missouri*, 458.]

NAPTON, J. This was a motion to set aside a judgment obtained against an infant who appeared by attorney. The judgment was rendered in 1841, and the motion was made in 1847, about two years after the defendant attained his majority. The motion was supported by several affidavits, both of the petitioners and others of his family to establish the truth of the facts stated therein.

The motion was overruled by the circuit court.

This is in the nature of a writ of error *coram nobis*. The object of this motion is to correct an error in fact, upon which certain proceedings in law have been based.

The objections taken to the motion here, are first, that the motion came too late, having been made after the infant attained his full age;<sup>2</sup> second, that our statute of limitations upon writs of error and the 8th section of the 7th article of the act concerning Practice at Law, constitute a bar from lapse of time.

The section above referred to provides, that "judgments in any court of record shall not be set aside for irregularity, on motion, unless such motion be made within five years after the term such judgment was rendered."

<sup>1</sup> See 23 Cyc. 883.

Now generally the relief formerly given on writ of error *coram nobis* is given on a simple motion. See *Harris v. Hardeman*, 14 How. (U. S.), 334, 346; 1 Black, Judgments, 2d ed., sec. 300; 1 Freeman, Judgments, 4th ed., sec. 94. — Ed.

<sup>2</sup> The opinion of the court on this objection is omitted. — Ed.

This section we deem inapplicable to the present motion, for the reason, that the entering of a judgment against an infant is not an irregularity, but an error. *Ex parte Toney*, 11 Mo. R. 663. Nor do we think the limitation of five years, fixed by our statute which regulates writs of error to the supreme court, applicable, because the error complained of here is not one of law, but of fact. The whole of our act regulating the practice in the supreme court, and writs of error generally, most manifestly is intended to apply to writs brought to correct errors of law. There is no limitation to be found in our statute book to a writ of error *coram nobis* — or a proceeding to correct a judgment of law founded upon an error of fact. The rare occurrence of such proceedings has doubtless caused them to be overlooked by the legislature. The courts have no power to supply the omission. . . .

*Judgment reversed and cause remanded.*<sup>1</sup>

[Blackstone, *Commentaries*, Book III, \* 405.]

*AN audita querela* is where a defendant, against whom judgment is recovered, and who is therefore in danger of execution, or perhaps actually in execution, may be relieved upon good matter of discharge, which has happened since the judgment: as if the plaintiff hath given him a general release; or if the defendant hath paid the debt to the plaintiff without procuring satisfaction to be entered on the record. In these and the like cases, wherein the defendant hath good matter to plead, but hath had no opportunity of pleading it (either at the beginning of the suit, or *pius darrein continuance*, which, as was shown in a former chapter must always be before judgment), an *audita querela* lies, in the nature of a bill in equity to be relieved against the oppression of the plaintiff. It is a writ directed to the court, stating that the complaint of the defendant hath been heard, *audita querela defendantis*, and then, setting out the matter of the complaint, it at length enjoins the court to call the parties before them, and having heard their allegations and proofs, to cause justice to be done between them. It also lies for bail, when judgment is obtained against them by *scire facias* to answer the debt of their principal, and it happens afterwards that the original judgment against their principal is reversed: for here the bail, after judgment had against them, have no opportunity to *plead* this special matter, and therefore they shall have redress by *audita querela*; which is a writ of a most

<sup>1</sup> *State v. Calhoun*, 50 Kan. 523, 18 L. R. A. 838, *accord*. See *Bronson v. Schulten*, 104 U. S. 410, 26 L. ed. 797. — Ed.

remedial nature, and seems to have been invented lest in any case there should be an oppressive defect of justice, where a party who hath a good defense is too late to make it in the ordinary forms of law.

But the indulgence now shown by the courts in granting a summary relief upon motion, in cases of such evident oppression, has almost rendered useless the writ of *audita querela*, and driven it quite out of practice.<sup>1</sup>

THE UNITED STATES *v.* JULIUS M. MAYER,  
Judge of the District Court of the United States for the  
Southern District of New York.

SUPREME COURT OF THE UNITED STATES. 1914.

[Reported 235 *United States*, 55.]

THE facts stated in the certificate may be summarized as follows:

On March 14th, 1913, one Albert Freeman with two other individuals, was convicted in the District Court, Southern District of New York, on five indictments for violation of the statutes relating to the use of the mails and for a conspiracy. On that day judgments of conviction were entered and sentences were imposed as to certain of these indictments, or counts therein, sentence being suspended as to others; and on March 24th, 1913, the defendant Freeman sued out a writ of error from the Circuit Court of Appeals to review the judgments of conviction. Assignments of error were filed; and on May 13th, 1913, the plaintiff in error was admitted to bail by the appellate court. No bill of exceptions has been settled or filed or argument had.

On January 12th, 1914, the plaintiff in error gave notice of application in the District Court to set aside the judgments of conviction, and for the quashing of the indictments, or for a new trial. The grounds were, among others, (1) that the defendant had been deprived of a fair trial by the misconduct of an assistant United States attorney and (2) that one juror when examined on his voir dire concealed a bias against the defendant. It is found as a fact by the District Judge, that neither the defendant nor his counsel had knowledge of the facts on which the motion was based

<sup>1</sup> See *Longworth v. Screven*, 2 Hill (S. C.), 298; 1 Black, Judgments, 2d ed., sec. 299; 1 Freeman, Judgments, 4th ed., sec. 95.

A writ of *audita querela* may be brought after the expiration of the term at which judgment was rendered. *Stone v. Seaver*, 5 Vt. 549. — Ed.



until after the conclusion of the trial and the expiration of the term as to those counts upon which sentence had been imposed, and that these facts could not have been discovered earlier by reasonable diligence.

Upon the hearing of the application, District Judge Mayer raised the question of the jurisdiction of the District Court to entertain it, in view of the fact that the term had expired. Thereupon the United States attorney submitted a memorandum tendering his consent that the application be heard upon the merits. The application was heard and District Judge Mayer handed down his decision granting a new trial, "on the ground that defendant had not had a trial by an impartial jury for the reason that one of the jurors at the time of his selection entertained a bias against the defendant resulting from the juror's observations of the conduct of the defendant and other corporate officers in relation to the production of certain corporate records before a grand jury of which he had been a member, the juror having concealed his bias on his examination on the voir dire for the purpose of securing the jury fees and the events of the trial having been such as to strengthen and confirm this bias." The order vacating the judgments of conviction and granting a new trial has not yet been entered, the District Judge having filed a memorandum stating in substance that the question of jurisdiction was an important one and that the order would be withheld until the United States attorney had an opportunity to raise the question in a higher court.

Thereafter, and on April 6th, 1914, the United States attorney procured an order in the Circuit Court of Appeals directing District Judge Mayer to show cause why a writ of prohibition should not be issued from that court forbidding the entry of an order vacating the judgments of conviction and granting a new trial upon the ground that the District Court was without jurisdiction to enter it. Certain of the facts upon which the motion for a new trial was granted do not appear in the record of the previous trial.

The questions certified are:<sup>1</sup> . . .

*"Question 2*

"When a writ of error has been issued to review a judgment of conviction in a criminal cause entered in a District Court, has the District Court, upon a motion made after the term at which

<sup>1</sup> A part of the case, dealing with the question of the jurisdiction of the Circuit Court of Appeals to issue a writ of prohibition, is omitted. — Ed.

judgment was entered, jurisdiction to set aside the judgment and order a new trial on facts discovered after the expiration of said term and not appearing in the record of the previous trial ?

“Question 3

“Whether, when a District Court has itself raised the question of its jurisdiction to entertain a motion made after the expiration of the term to vacate a judgment of conviction and the United States attorney thereupon tendered its consent to the hearing of the motion on the merits if the jurisdictional question raised by the court were dependent on that consent, the United States is debarred by such tender from raising the question of jurisdiction of the District Court to vacate said judgment ?”

HUGHES, J.<sup>1</sup> . . . 1. In the absence of statute providing otherwise, the general principle obtains that a court cannot set aside or alter its final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun during that term. *Hudson v. Guestier*, 7 Cranch 1; *Cameron v. M'Roberts*, 3 Wheat. 591; *Ex parte Sibbald*, 12 Pet. 488, 492; *Bank of United States v. Moss*, 6 How. 31, 38; *Bronson v. Schulten*, 104 U. S. 410, 415-417; *Phillips v. Negley*, 117 U. S. 665, 673, 674; *Hickman v. Fort Scott*, 141 U. S. 415; *Hume v. Bowie*, 148 U. S. 245, 255; *Tubman v. B. & O. R. R. Co.*, 190 U. S. 38; *Wetmore v. Karrick*, 205 U. S. 141, 149-152; *In re Metropolitan Trust Co.*, 218 U. S. 312, 320, 321. There are certain exceptions. In the case of courts of common law — and we are not here concerned with the special grounds upon which courts of equity afford relief — the court at a subsequent term has power to correct inaccuracies in mere matters of form, or clerical errors, and, in civil cases, to rectify such mistakes of fact as were reviewable on writs of error *coram nobis*, or *coram vobis*, for which the proceeding by motion is the modern substitute. *Pickett's Heirs v. Legerwood*, 7 Pet. 144, 148; *Matheson's Adm'r. v. Grant's Adm'r.*, 2 How. 263, 281; *Bank of United States v. Moss*, *supra*; *Bronson v. Schulten*, *supra*; *Phillips v. Negley*, *supra*; *In re Wight*, 134 U. S. 136; *Wetmore v. Karrick*, *supra*. These writs were available to bring before the court that pronounced the judgment errors in matters of fact which had not been put in issue or passed upon and

<sup>1</sup> A part of the opinion, holding that the Supreme Court has authority to answer the questions certified, and that the Circuit Court of Appeals had jurisdiction to issue the writ of prohibition, is omitted. — Ed.

were material to the validity and regularity of the legal proceeding itself; as where the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or died before verdict or interlocutory judgment, — for, it was said, ‘error in fact is not the error of the judges and reversing it is not reversing their own judgment.’ So, if there were error in the process, or through the default of the clerks, the same proceeding might be had to procure a reversal. But if the error were ‘in the judgment itself, and not in the process,’ a writ of error did not lie in the same court upon the judgment, but only in another and superior court. Tidd, 9th ed., 1136, 1137; Stephen on Pleading, 119; 1 Roll. Abr., 746, 747, 749. In criminal cases, however, error would lie in the King’s Bench whether the error was in fact or law. Tidd, 1137; 3 Bac. Abr. (Bouv. ed.) “Error,” 366; Chitty, Crim. L., 156, 749. See *United States v. Plumer*, 3 Cliff. 28, 59, 60. The errors of law which were thus subject to examination were only those disclosed by the record, and as the record was so drawn up that it did not show errors in the reception or rejection of evidence, or misdirections by the judge, the remedy applied ‘only to that very small number of legal questions’ which concerned ‘the regularity of the proceedings themselves.’ See Report, Royal Commission on Criminal Code, (1879) p. 37; 1 Stephen, Hist. Crim. L., 309, 310.

In view of the statutory and limited jurisdiction of the federal district courts, and of the specific provisions for the review of their judgments on writ of error, there would appear to be no basis for the conclusion that, after the term, these courts in common law actions, whether civil or criminal, can set aside or modify their final judgments for errors of law; and even if it be assumed that in the case of errors in certain matters of fact, the district courts may exercise in criminal cases — as an incident to their powers expressly granted — a correctional jurisdiction at subsequent terms analogous to that exercised at common law on writs of error *coram nobis* (See Bishop, New Crim. Pro., 2d ed., § 1369), as to which we express no opinion, that authority would not reach the present case. This jurisdiction was of limited scope; the power of the court thus to vacate its judgments for errors of fact existed, as already stated, in those cases where the errors were of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid. In cases of prejudicial misconduct in the course of the trial, the misbehavior or partiality of jurors, and newly discovered evidence, as well as where it is sought to have the



court in which the case was tried reconsider its rulings, the remedy is by a motion for a new trial (Jud. Code, sec. 269) — an application which is addressed to the sound discretion of the trial court, and, in accordance with the established principles which have been repeatedly set forth in the decisions of this court above cited, cannot be entertained, in the absence of a different statutory rule, after the expiration of the term at which the judgment was entered.

State statutes relating to the granting of new trials are not applicable. As was said by this court in *Bronson v. Schulten*, *supra*, — “The question relates to the power of the courts and not to the mode of procedure. It is whether there exists in the court the authority to set aside, vacate, and modify its final judgments after the term at which they were rendered; and this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a State or the practice of its courts.” See, also, *Ind. & St. L. R. R. Co. v. Horst*, 93 U. S. 291, 301; *Mo. Pac. Rwy. Co. v. C. & A. R. R. Co.*, 132 U. S. 191; *Fishburn v. C. M. & St. P. Ry. Co.*, 137 U. S. 60; *Fuller v. United States*, 182 U. S. 562, 575; *United States v. 1621 Pounds of Fur Clippings*, 106 Fed. 161; *City of Manning v. German Ins. Co.*, 107 Fed. 52.

2. As the District Court was without power to entertain the application, the consent of the United States attorney was unavailing. *Cutler v. Rae*, 7 How. 729, 731; *Byers v. McAuley*, 149 U. S. 608, 618; *Minnesota v. Hitchcock*, 185 U. S. 373, 382. It is argued, in substance, that while consent cannot give jurisdiction over the subject matter, restrictions as to place, time, etc., can be waived. *Gracie v. Palmer*, 8 Wheat, 699; *Toland v. Sprague*, 12 Pet. 300, 331; *Ayers v. Watson*, 113 U. S. 594, 598; *Martin's Adm'r. v. B. & O. R. R. Co.*, 151 U. S. 673, 688; *Rexford v. Brunswick-Balke Co.*, 228 U. S. 339, 344, 345. This consideration is without pertinency here, for there was no general jurisdiction over the subject matter, and it is not a question of the waiver of mere ‘modal or formal’ requirements, of mere private right or personal privilege. In a federal court of competent jurisdiction, final judgment of conviction had been entered and sentence had been imposed. The judgment was subject to review in the appellate court, but so far as the trial court was concerned it was a finality; the subsequent proceeding was, in effect, a new proceeding which by reason of its character invoked an authority not possessed. In these circumstances it would seem to be clear that the consent of



the prosecuting officer could not alter the case; he was not a dispensing power to give or withhold jurisdiction. The established rule embodies the policy of the law that litigation be finally terminated, and when the matter is thus placed beyond the discretion of the court it is not confided to the discretion of the prosecutor. . . .

Mr. Justice McReynolds took no part in the consideration and decision of this case.

WISCONSIN STATUTES, 1911.

Section 2832. The court or a judge may likewise, in discretion and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, stipulation or other proceeding against him, through his mistake, inadvertence, surprise or excusable neglect and may supply an omission in any proceedings; and whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of law the court may, in like manner and upon like terms, permit an amendment of such proceeding as to make it conformable thereto.

Section 2833. When service of the summons shall have been made by publication, if the summons shall not have been personally served on a defendant nor received by such defendant through the post office, he or his representatives shall, on application and good cause shown, at any time before final judgment, be allowed to defend the action; and, except in an action for divorce or annulment of the marriage contract, the defendant or his representative shall in like manner, upon good cause shown and such terms as shall be just, be allowed to defend after final judgment at any time within one year after actual notice thereof and within three years after its rendition. If the defense be successful and the judgment or any part thereof shall have been collected or otherwise enforced such restitution may thereupon be compelled as the court shall direct; but the title to property, sold under such judgment to a purchaser in good faith, shall not thereby be affected.<sup>1</sup>

<sup>1</sup> See 1 Black, *Judgments*, 2d ed., sec. 334; 1 Freeman, *Judgments*, 4th ed., chap. VII; 23 Cyc. 907. — *Ed.*

## STEVENS v. HELM.

SUPREME COURT OF INDIANA. 1860.

[Reported 15 *Indiana*, 183.]

APPEAL from the Rush Common Pleas.

DAVISON, J. This was an action, instituted in the Rush Common Pleas, by the appellee, who was the plaintiff, against Andrew Stevens, upon a promissory note, for the payment of \$300. Process against the defendant was duly issued to the sheriff, returnable to the second day of the April term, 1859, of said Court; upon which there is indorsed, the following return: "Served by leaving a copy at his usual place of residence, this April 13, 1859." (Signed) "H. Laughlin, S. R. C., per S. B. Laughlin." On the day on which the process was returnable, the defendant was called and defaulted, and judgment by default was entered against him. Afterward, on the same day, the defendant appeared, and moved to set aside the default, and in support of his motion, filed an affidavit, alleging, "that he was summoned to answer the complaint on that day; that he had left his home in an extreme part of Rush county, early that morning, expecting to be in time for Court; that he came with all reasonable dispatch, and arrived at Court shortly after 9 o'clock A. M., and found that a judgment by default had been rendered against him. That he is desirous of making a defense against the action; that he has come to Court for that purpose, and will be ready to file his answer by the next calling of the cause, provided the Court will set aside the default. The motion was refused, and the defendant excepted.

There is nothing in this exception. The affidavit fails to show any valid defense to the note, and for that reason, alone, it is an insufficient support to the motion. Where the default has been regularly taken, the Court is not authorized to set it aside, unless the defendant shows, affirmatively, that he has a meritorious defense to the action. 1 Tidd's Prac., 3 Am. Ed., p. 567.

But it is said that "the Court erred in rendering judgment by default without proof of the service of process on the defendant." The return is signed, "H. Laughlin, S. R. C., per S. B. Laughlin," and the point relied on is, that "S. B. Laughlin" does not appear to have had authority, as deputy sheriff, or otherwise, to serve the process. In the absence of contrary proof, we will presume that the Court, when it ordered the default, was fully satisfied, by evidence, that the process was regularly served. Moreover, the

question as to the service of process does not appear to have been raised in the Common Pleas, and is not, therefore, properly before this Court.

*Per Curiam.* The judgment is affirmed, with 5 per cent damages, and costs.

ADAMS *v.* HICKMAN.

SUPREME COURT OF MISSOURI. 1869.

[Reported 43 *Missouri*, 168.]

CURRIER, J.<sup>1</sup> The question involved here is one of practice. An interlocutory judgment by default was rendered against the defendant, who, the succeeding day, moved the court to set it aside, and for leave to file an answer. The motion was accompanied with an affidavit and various exhibits. It was overruled by the court, and final judgment entered for the plaintiff. This judgment was reversed by the District Court, and the plaintiff brings the case here by writ of error. From the affidavit and papers in the case, among which is the defendant's answer, it appears that the suit was by attachment to the Cooper County Circuit Court, February term, 1867, the defendant being a non-resident, and notice being given by publication. No actual notice of the pendency of the suit appears to have reached him till July, 1867. The defendant was absent in Europe from about the last of the preceding December till that time. Before leaving for Europe, in December, in anticipation of a suit, the defendant engaged counsel to represent him, who appeared at the February term of the court and obtained an extension of the time for pleading to within ninety days of the succeeding August term of the court, it being then believed that the defendant would be back from Europe by the 1st of May, 1867. He did not reach New York, however, till July, where he met a letter from his attorney advising him of the suit. He thereupon hastened to Boonville, and had his answer prepared, which was lodged with the clerk of the court on the 9th of July. He then proceeded to Texas, and obtained testimony to be used on the trial of the cause, and was ready for trial at the August term, to which the case stood continued. The answer is elaborate, and the affidavit filed by the attorney states that it could not be prepared without the assistance of the defendant. The earnest determination of the defendant to defend against the claim sued

<sup>1</sup> Only the opinion of the court is here given. — Ed.

on is manifest. Under the circumstances it would be, as it seems to us, more technical than reasonable to deny him an opportunity of doing so. The answer discloses merits, and the affidavit and exhibits show reasonable diligence, both on the part of the attorney and his client. A meritorious defense and a reasonable degree of diligence in making it is all that it is necessary to establish, in order to justify the setting aside of the interlocutory judgment.

The judgment of the District Court reversing the judgment of the Circuit Court is affirmed. The other judges concur.

CENTREVILLE NATIONAL BANK OF WARWICK  
*v.* INMAN.

SUPREME COURT OF RHODE ISLAND. 1912.

[Reported 34 *Rhode Island*, 391.]

PARKHURST, J. The defendant was defaulted in the Superior Court under the following circumstances; the suit was brought August 1, 1911, and made returnable August 15, 1911; the defendant employed an attorney who seasonably entered his appearance for defendant on August 9, 1911; and said attorney was, upon his request, duly excused from further attendance on the Superior Court from August 9 to September 15, 1911, and went away on a vacation and did not plead to the action within the time fixed by statute; while he was away, notice of motion by plaintiff's attorney to take judgment by default was left at his office, but not received by him, and default was taken September 2, 1911, before a justice other than the one who excused the attorney; upon the return of the defendant's attorney in September, he immediately moved to take off the default and a hearing was had before the Presiding Justice of the Superior Court, who heard evidence upon the question, whether the defendant had a defence to the action, as a condition precedent to taking off the default and allowing the defendant to plead to the action and proceed to trial.

From the transcript of the proceedings at this hearing, it does not appear that the question of the absence of the defendant's attorney on vacation and of his being excused by a justice of the court or that this was a valid excuse for not pleading to the action, was questioned; or that any question was considered, other than to find out whether the defendant had a defence to the action, it being conceded by the justice at the hearing that he would take



off the default and allow the defendant to plead and go to the jury, if he could see any reasonable defence. But after hearing evidence from the defendant and also from the cashier of the plaintiff bank, the justice decided that there was no reasonable defence, and refused to take off the default. To this decision the defendant took exception and the case is now before this court upon this exception.

It appears that the note, upon which the suit was brought, was originally for \$1,200, dated July 2, 1904, to the order of the plaintiff, payable six months after date. It bears upon its face the signature of Daniel E. Sullivan and D. Lehane, and also the name "Charles M. Inman"; but Mr. Inman says he never saw the note until June 30, 1906, when he admits that he signed his name on the back of the note, under the words "June 30, 1906, I hereby guarantee the payment of this note." He denies that he ever saw the note before this latter date; but he is not certain whether he did or not place his name on the face of the note at this time. The cashier testified that he saw Mr. Inman sign the note in both places, but he does not give the date at which he claims it was signed on its face, nor does he offer any explanation why the defendant, if he was a joint and several maker, should have signed a guaranty on the back of the note, or why, if he was a guarantor, he should have signed on the face of the note, as a joint and several maker. We think the note itself indicates that the signature of Charles M. Inman was placed thereon in different ink and probably at a different time from the other signatures; and it appears that the claim of Mr. Inman is that he had nothing to do with the note when it was given, and knew nothing of it till nearly two years after its date, when he admits that he guaranteed it. The declaration simply declares against Mr. Inman as a maker of the note and so as primarily liable, but contains no count against him as a guarantor.

Under the circumstances, we think that the defendant should have been permitted to go before a jury and make his defence on the question whether or not he was a maker of the note, he being sued only as maker and not as a guarantor.

In the matter of motions to take off defaults, where the question whether the defendant has a defence on the merits is involved, it has been frequently held, that the court hearing the motion will not seek to determine whether the defence claimed will prevail on a trial; *Excise Commrs. v. Hollister*, 2 Hilt (N. Y.) 588; *Benedict v. Arnoux*, 85 Hun (N. Y.) 283; nor will the court, on the motion

hear counter affidavits on the merits or examine into the truth of the allegations of defence — 6 Encyc. Pl. & Pr. 188 and *cas. cit.*; *Francis v. Cox*, 33 Cal. 323; *Gracier v. Weir*, 45 Cal. 53; *Buck v. Havens*, 40 Ind. 221, 224; *Hanford v. McNair*, 2 Wend. (N. Y.) 286.

The error of the court in the case at bar was in passing upon the truth and sufficiency of the defendant's claim that he was not a maker of the note, which could only properly be passed upon by a jury on the trial of the case, or by the court in case a jury trial was waived.

The defendant's exception is sustained, and the case is remitted to the Superior Court, with direction to enter its order taking off the default upon such terms as to costs, as it shall determine, and to permit the defendant to plead within such time as it shall fix and for further proceedings.

BARRETT *et al.* v. THE QUEEN CITY CYCLE  
COMPANY.

SUPREME COURT OF ILLINOIS. 1899.

[Reported 179 *Illinois*, 68.]

CRAIG, J. This was an action of assumpsit, brought by appellee in the circuit court of Cook county, against appellants. The declaration contained the common counts for goods sold and delivered, amounting to the sum of \$2000. The action was brought on December 6, 1897. On the next day service was accepted, and on the 10th day of December Hahn & Horn, who were attorneys for appellants, entered their appearance in the cause. On the same day a declaration was filed by plaintiff, and on the 23d day of December, no plea having been filed, a default was entered and judgment rendered for \$1367.97. At the same term of court a motion was made to set aside the default, but it was overruled by the court. The appellants appealed to the Appellate Court, where the judgment was affirmed, and to reverse the judgment of the Appellate Court this appeal was taken.

The judgment of a circuit court cannot be reversed on appeal, in a case of this character, unless it appears that there has been an abuse of the discretion of that court, and where it appears that the party defaulted has failed to exercise due diligence it has never been held an abuse of discretion to refuse to vacate a judgment. As

a general rule, diligence and merits must both appear, otherwise the discretion of the court will not be interfered with in a case of this character. The entire showing as to diligence is embraced in the affidavit of Hahn, appellants' attorney, viz.: "That inadvertently no plea was filed under the following circumstances, to wit: That William F. Dockery, a clerk in the office of defendants' attorneys, inadvertently placed the cause on the office diary for the January term in place of the December term, 1897, for answer to be filed." We do not think this affidavit shows proper diligence. The attorneys of appellants knew that the suit was commenced in time to require a plea at the December term of court, and if they had looked at the files they would have found a declaration on file which required an answer at that term. They did not, however, take this precaution but relied on a memorandum made by their clerk, who, it seems, made a mistake, and through inadvertence placed the cause on the office diary for the January term in the place of the December term. It was held in *Schultz v. Meislar*, 144 Ill. 26, that inadvertence is not a sufficient ground to set aside a judgment rendered by default. It is there said: "The affidavits may be conceded to disclose a meritorious defense, but they show no reason why plea was not filed within the proper time, other than that the attorney employed by appellant to defend him in that case, and who represents appellant in this appeal, failed to do so through press of business and inadvertence. If this attorney was unable to attend to the case through press of business, it was plainly the duty of appellant to employ another attorney who could attend to it, and the negligence of the attorney in failing to file a plea is the negligence of his client. — *Mendell v. Kimball*, 85 Ill. 582; *Walsh v. Walsh*, 114 id. 655."

It is claimed that the court erred in allowing appellee to read an affidavit on the motion to vacate the judgment. Conceding that affidavits on behalf of appellee were inadmissible, the one read on the motion related solely to the merits, and hence did no harm, as the case turned on the question of diligence.

We think no sufficient ground was shown to set aside the judgment, and the judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*<sup>1</sup>

<sup>1</sup> See 23 Cyc. 939. Compare *Betts v. Betts*, 165 N.Y. App. Div. 274.—Ed.

ROGERS and TALLMAN *v.* CUMMINGS.

SUPREME COURT OF IOWA. 1861.

[Reported 11 *Iowa*, 459.]

TRESPASS for seizing and selling goods which did not belong to the defendant in the execution. Judgment by default against defendant, who, two days thereafter, moved the court to set aside said default, which motion was based upon several affidavits showing a meritorious defense, and what was claimed to be a reasonable excuse for having made such default. Motion sustained and default set aside. Plaintiffs excepted, and upon this exception alone the case comes into this court.

LOWE, C. J. Applications of this kind are so entirely addressed to the favor and discretion of the court that unless it is clear and manifest, from the circumstances developed, that the court has abused this discretion we should not disturb such ruling. When all the facts brought to light in the four affidavits made in support of the motion are duly considered we are by no means satisfied that the court abused its discretion.

*Judgment affirmed.*<sup>1</sup>

<sup>1</sup> See *Iowa Savings & Loan Ass'n v. Kent*, 134 Ia. 444, 109 N. W. 773.

The action of the court in opening a default is reviewable for abuse of discretion. *Cascade Hotel Co. v. Orleans Real Est. Co.*, 153 N. Y. App. Div. 882, 137 N. Y. Supp. 1054, affirmed 100 N. E. 1125. — ED.



## CHAPTER XII.

### THE ENFORCEMENT OF JUDGMENTS.

[Smith, *Action at Law* (2d ed.), pp. 162-176.]

If the judgment be not reversed, vacated, or set aside, the prevailing party has a right to issue *Execution*. This, if the judgment be, as it almost always is, for so much money, is mostly by writ of *Fieri Facias*, *Capias ad Satisfaciendum* or *Elegit*. There are indeed two other modes of execution, one by *Levari Facias*, and the other by *Extent*; but the former being altogether unusual, and the latter almost entirely appropriated to the crown, no further notice will be here taken of them.

A *Fieri Facias* is, like the *Capias ad Satisfaciendum* and *Elegit*, a judicial writ, and issues out of the court in which the judgment against the defendant was recovered. Except in counties palatine (where it is addressed to the palatine officer), it is directed to the sheriff of the county where the *venue* in the action was laid, commanding him that of the goods and chattels of the defendant, he *cause to be made* the sum recovered, and have it before the court on the return day: this being delivered to the sheriff, or his deputy, he makes a warrant to one of his officers, or, if he be the officer of a county palatine, grants his mandate to the sheriff, who in his turn issues a warrant to his officer. . . .

When the writ becomes returnable, the sheriff may return *Fieri Feci*, *i. e.*, that he has levied the sum named in the writ, or a part of it, which he is ready to pay to the execution creditor; or, that he has taken goods which remain unsold for want of buyers; or *nulla bona*, *i. e.*, that the defendant has no goods within his bailiwick; or, any other legal excuse for not levying. If money have been levied, and the sheriff neglect to pay it over, the creditor may obtain it from him either by rule of court or action. If part only be levied and, of course, when *nulla bona* is returned, he may have a new execution for the residue; and, if he think proper still to proceed by *Fieri Facias*, may sue out either an *Alias Fieri Facias*, into the same, or a *Testatum Fieri Facias* into any other county. If the return be, that the goods are unsold for defect of buyers, he may have a *Writ of Venditioni Exponas* commanding the sheriff to sell

them. And, lastly, if the return be false, an action may be brought against the sheriff. . . .

A *Capias ad Satisfaciendum*, is a writ by which the sheriff is commanded to take the defendant, and him safely keep, so that he may have him in court on the return day, *to satisfy* the plaintiff. This process lies against every one who was not personally privileged against arrest at the commencement of the suit, and against some who were, such as attornies.

The sheriff must execute it literally according to its terms, and has no power, instead of arresting the defendant, to receive the money due from him, but, if the defendant wish to liberate himself by payment, he must have recourse to the execution creditor, who is bound, on tender of the sum due, to sign a proper authority for his discharge. On the return day of this writ the sheriff generally returns *Cepi Corpus et paratum habeo*, *i. e.*, that he has taken the body of the defendant and has it ready; or that the defendant is so ill that he cannot remove him without danger to his life; or he may return *non est inventus*, *i. e.*, that the defendant is not found within his bailiwick. If the last return be made, the plaintiff may sue out an *Alias Capias* into the same, or a *Testatum Capias* into another county, or he may, if he please, sue out an *Exigi Facias*, and proceed to *Outlawry*.

If the defendant be taken, he either remains in the custody of the sheriff in the county gaol, or is removed by *Habeas Corpus* to the prison of the superior court. In either case the law sets so high a value upon the liberty of the subject, that it considers the execution a satisfaction of the judgment *as against him*; and, therefore, though the defendant had died in prison, or been discharged by privilege of parliament, the plaintiff's remedy would have been at an end, but for Stat. 2 Jac. 1, c. 13, and 21 Jac. 1, c. 24, the former of which gives execution after the privilege of parliament has ceased, and the latter execution against the deceased's goods and chattels; and if the defendant escape from the sheriff, or be rescued, the plaintiff may have new process to retake him, though he will also in that case have a remedy against the sheriff or gaoler for his dereliction of duty.

An *Elegit* is a writ first given by the statute of Westminster the second, which enacted that where a debt is acknowledged or recovered in the King's Court, or damages awarded, it shall be *in the election* of him who sues for such debt or damages, to have a *Writ of Fieri Facias*, or that the sheriff deliver to him all the chattels of the debtor, saving his oxen and beasts of the plough, and a

moiety of his land, until the debt be levied by a reasonable price or extent.

This writ of execution against the defendant's land may be had as well after his death as before it. The sheriff on receiving it is to empanel a jury, who enquire of the goods and chattels of the defendant, and appraise them, and also enquire of his lands and tenements. The goods and chattels are delivered to the plaintiff at the price at which they have been valued by the jury; a mode different from that pursued in executing a *Fieri Facias*, under which the sheriff must sell the goods which he has taken. If the goods and chattels were not sufficient to satisfy the plaintiff's demand, the sheriff was to extend a moiety of the lands, under which term were included reversions and rent-charges belonging to the defendant, but copyholds, rents-seek, advowsons in gross, or glebe belonging to a parsonage or vicarage were not extendible, nor were lands held in trust so, until 29 Car. 2, c. 3, s. 10; though, by that statute, some species of trust property, to which the defendant was entitled at the time of execution sued, might have been extended. . . .

After the expiration of a year and a day, the plaintiff cannot sue out any of the above *Writs of Execution*, without revising his judgment by a writ of *Scire Facias*; the reason of which is, that, after so long a space of time, the court, *primâ facie*, presumes his demand to be satisfied. We will present the reader with a short account of the proceedings by which the revival of a judgment is effected.

A *Scire Facias* is a writ founded upon some matter of record. When brought, as it may be, to repeal a patent, it is an original writ issuing out of the Court of Chancery; in other cases it is a judicial writ, and is sued out of the court in which the record on which it is founded happens to be. It is considered as the commencement of a new action, and has, therefore, been enumerated at the beginning of this Treatise, among *Actions Personal*. Among the great variety of purposes to which it may be applied, it is here intended to consider only the mode in which it is used, for the purpose of revising a judgment. . . .

The *Scire Facias* states the judgment recovered by the plaintiff, and that execution still remains to be had, and commands the sheriff to *make known* to the defendant that he be in court at the return day, to shew why the plaintiff ought not to have execution. After the judgment has been revived by means of this writ, the plaintiff must take out execution within a year and a day from the revival; for if he do not, or if the defendant happen to die, he can-

not afterwards take out execution, but will be forced to bring a new *Scire Facias*.

A *Scire Facias* upon a judgment is necessary, not only when the plaintiff has delayed to take out execution within a year and a day, but also when any new person is to be benefited or charged by the execution of the judgment; for it is a rule that executions, and all other judicial writs, must pursue and correspond with the judgments on which they are founded; therefore, if a judgment be obtained against A., and he die, a writ of execution cannot issue against his executor, for he was no party to the judgment; so, if the plaintiff obtain judgment, and marry, execution cannot issue in favour of her husband, for he is not mentioned in the record. In these and similar cases, a writ of *Scire Facias* is sued out, which recites the facts as they have happened; the judgment given upon that writ includes the new party intended to be benefited or charged, and execution may be afterwards sued out upon that judgment.

[Blackstone, *Commentaries*, Book III, \* pp. 412–413.]

If the plaintiff recovers in an action real or mixed, wherein the seisin or possession of land is awarded to him, the writ of execution shall be an *habere facias seisinam*, or writ of seisin, of a freehold; or an *habere facias possessionem*, or writ of possession, of a chattel interest. These are writs directed to the sheriff of the county, commanding him to give actual possession to the plaintiff of the land so recovered: in the execution of which the sheriff may take with him the *posse comitatus*, or power of the county; and may justify breaking open doors, if the possession be not quietly delivered. But, if it be peaceably yielded up, the delivery of a twig, a turf, or the ring of the door, in the name of seisin, is sufficient execution of the writ. . . .

Upon a replevin, the writ of execution is the writ *de retorno habendo*.

[*Form of Writ of Fieri Facias*.]<sup>1</sup>

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, defender of the faith, to the sheriff of ..... greeting: We command you that you cause to be made of the goods and chattels in your bailiwick of C. D. the sum of £....., which in our court before us at Westminster were awarded to A. B. for his damages which he had sustained, as well on occasion of not

<sup>1</sup> See Smith, *Action at Law*, 2d ed., p. 222. — Ed.



performing certain promises and undertakings as for his costs and charges by him about his suit in that behalf expended: whereof the said C. D. is convicted, as appears to us of record; and have you that money before us at Westminster, immediately after the execution hereof [or "on \_\_\_\_\_,"] to render to the said A. B. for his said damages; and have you there then this writ. Witness (*name of chief justice*) at Westminster, the.....day of....., in the.....year of our reign.

### HARGIS *v.* MORSE.

SUPREME COURT OF KANSAS. 1871.

[Reported 7 *Kansas*, 415.]

BREWER, J.<sup>1</sup> Defendant in error brought ejectment against plaintiff in error. Upon trial he proved title by patent and deed. Defendant in error attempted to show a transfer of title to herself by judgment, sale, and sheriff's deed. The evidence she offered was rejected, and this ruling is brought here for review. She offered the journal entry of judgment in the case of "William H. Strode *v.* Enoch L. Morse," in the Doniphan county district court, the order and the confirmation of sale, the appraisement, and the sheriff's deed. Each was rejected on the ground that no legal service was shown to have been made in that action upon the defendant Morse. It is not claimed that there was any proof of service. The only testimony which could in any degree have any bearing in that direction was the testimony of the clerk of the district court, that, by fire in 1867 the files of all cases disposed of, among them the case of "Strode *v.* Morse," were burned; and the first sentence in the journal entry of judgment, which contains these words: "the defendant still failing to answer or demur, although duly served by publication in the *Troy Weekly Investigator*, a weekly newspaper published in Doniphan county, and *State of Kansas*." The testimony of the clerk tended neither to prove nor disprove the fact of service; at most it simply laid the foundation for secondary evidence. The journal entry disclosed the manner in which service had been attempted to be made. A judgment rendered against a party not in court is void. It conveys no title, affects no rights. The title shown by the patent and deed in Morse could not be transferred by any judgment against him unless rendered in a court which had acquired jurisdiction of his person. Until such jurisdic-

<sup>1</sup> Only the opinion of the court is given. — Ed.

tion appeared, neither judgment, sale, nor deed were competent evidence: 2 Kas., 340. Neither is the difficulty avoided by the presumption which exists in favor of the proceedings in courts of general jurisdiction. That presumption arises only when the record is silent; it does not supersede the record. A party may not introduce part of a record, and relying on presumptions, withhold the remainder. In this case the plaintiff in error commenced her testimony with the entry of judgment. True, she proved that the files of the case were destroyed by fire; but she made no attempt to prove what those files contained. The final record required by the laws of 1862 should contain the pleadings, the process, the return, etc.: Comp. Laws, p. 189, § 402. In the absence of proof to the contrary we must presume such record was made, and was still in existence. If there was no final record, the files of the newspaper would have contained the secondary testimony, or it might have been derived from the officers of the court, the parties, or attorneys in the case. At any rate, until it appears, not merely that the papers are gone, but also that there is no secondary proof of their contents, there is no presumption, even in favor of the proceedings of a court of general jurisdiction, from the existence of one part of a record that the remainder would, if produced, contain the facts necessary to give the court jurisdiction. This case never got so far as a question of presumptions; it stopped on a question of evidence.

All the Justices concurring.

*The judgment is affirmed.*

## LOS ANGELES COUNTY BANK v. RAYNOR.

SUPREME COURT OF CALIFORNIA. 1882.

[Reported 61 *California*, 145.]

McKEE, J. This was an action for recovering the possession of a tract of land.

At the trial of the issue made by the complaint and answer, the plaintiff, to prove his right of entry, offered in evidence the judgment roll in the case of the Los Angeles County Bank v. the defendant, P. A. Raynor, and others. The roll showed that an action had been commenced in the late District Court of San Bernardino County, on May 2, 1876, to foreclose a mortgage given by Raynor to the bank upon the land in dispute; that summons had been duly issued, and was personally served on Raynor, who made default; and that, after his default had been entered, the Court made and filed its written finding and conclusions of law, upon

which judgment was duly given and signed by the Judge, June 27, 1876; but the judgment was not entered in the judgment book until March 21, 1881, when it was then indorsed by the Clerk of the Court "Entered as of June 26, 1876, by stipulation of the defendant Raynor." The plaintiff also offered in evidence an execution issued on the judgment June 27, 1876; the return of the Sheriff indorsed thereon August 1, 1876, showing that he had sold the premises to the plaintiff, and a deed of the premises made by the Sheriff to the plaintiff, February 1, 1877.

To each of these offers the defendant objected, that there had never been any legal entry of the judgment; that the execution was issued and returned before any proper or legal entry of the judgment; and that, in consequence, the execution sale and Sheriff's deed were irregular and void, and passed no title. The objections were overruled and the defendant excepted. We think the exception was not well taken.

In an action of ejectment against a defendant in execution, it is not necessary for the plaintiff, who claims as a purchaser under the execution, to do more than show the judgment of a Court of competent jurisdiction, the execution issued thereon, and the Sheriff's deed. Upon proof of these things, the plaintiff makes out at least a *prima facie* case against the defendant. It is not claimed that the judgment in evidence, given on the 27th of June, 1876, was void. Being valid it was enforceable by execution; and the execution which was issued to enforce it, was sufficient authority to the Sheriff into whose hands it came, to make the sale of the land in controversy. The Sheriff's deed proved the sale; and the legal presumption is that all the acts of the officer which preceded the sale had been duly performed. *Hihn v. Peck*, 30 Cal. 280; *Donahue v. McNulty*, 24 id. 417; *Berry v. S. F. & N. P. R. R. Co.*, 44 id. 643. Every intendment must be indulged in favor of the validity of the proceedings not inconsistent with the record.

But it is urged that the record shows that the judgment was not entered when the execution was issued. Nor was it necessary that it should have been. The enforcement of a judgment does not depend upon its entry or docketing. These are merely ministerial acts, the first of which is required to be done for putting in motion the right of appeal from the judgment itself, and of limiting the time within which the right may be exercised (§ 681, C. C. P.), or in which the judgment may be enforced (§ 685, id.); and the other, for the purpose of creating a lien by the judgment upon the real property of the debtor. § 671, C. C. P. But neither is necessary

for the issuance of an execution upon a judgment which has been duly rendered. Without docketing or entry execution may be issued on the judgment and land levied upon and sold (*Hastings v. Cunningham*, 39 Cal. 144); and the deed executed by the Sheriff, in fulfillment of the sale, not only proves the sale, but also estops the defendant from controverting the title acquired by it. *Dodge v. Walley*, 22 Cal. 224; *McDonald v. Badger*, 23 id. 399; *Lessee of Cooper v. Galbraith*, 3 Wash. C. C. 550; *Blood v. Light*, 38 Cal. 649.

The finding covers the issues.

*Judgment affirmed.*<sup>1</sup>

McKINSTRY and ROSS, JJ., concurred in the judgment.

### BANK OF GENESEE v. SPENCER.

COURT OF APPEALS OF NEW YORK. 1858.

[Reported 18 *New York*, 150.]

APPEAL from the Supreme Court. In 1846 the plaintiff recovered judgment in that court against Spencer, Thomas and Burnet, who resided in different counties, and execution was immediately issued to the sheriffs of each of the counties, and was by them respectively returned unsatisfied. Burnet having died, the plaintiff, in 1854, issued an execution to the sheriff of Erie county, where Spencer then resided, against him and Thomas, the surviving defendants, without any application to the court for leave to do so. This execution having been returned unsatisfied, the plaintiff instituted proceedings supplementary thereto before the county judge of Erie, before whom Spencer was compelled to appear, and an order of reference to take his examination was made on the 24th February, 1855. He appealed from that order to the Supreme Court, by which it was affirmed, and he then appealed to this court. Pending the last appeal, and in October, 1855, he moved the Supreme Court, at special term, to set aside the execution for irregularity. The motion was denied, and the order denying it having been affirmed at general term in the eighth district, Spencer appealed to this court.

DENIO, J.<sup>2</sup> I am of opinion that the execution which the Supreme Court was applied to to set aside was not void but only

<sup>1</sup> See *Doughty v. Meek*, 105 Ia. 16, 74 N. W. 744.

As to the protection given to purchasers without notice of the judgment see *Ninde v. Clark*, 62 Mich. 124, 28 N. W. 765, 4 Am. St. Rep. 823. — Ed.

<sup>2</sup> A concurring opinion of Platt, J., is omitted. — Ed.



voidable. There was a judgment which warranted such process, and it had not been paid or released. The practice of the court, now regulated in that particular by statute, forbade the issuing of execution, after the lapse of five years, without an application to the court, or notice and proof that the judgment or a part of it remained unsatisfied. (Code, §§ 283, 284.) Generally, where an act is done contrary to the provisions of a statute, it is wholly void, unless it fall within the class of merely directory provisions, the omission to conform to which does not wholly vitiate the proceeding. This is not a case of that kind. But when the whole practice of the court came to be regulated by statute, it was foreseen by the legislature that great inconvenience would ensue from the principle referred to, as it would preclude the courts from relieving parties from slips in practice, arising from inadvertant omissions and mistakes. This power was very useful, and indeed indispensable, for without it there would be danger, in any stage of the case, that the rights of parties might be sacrificed to the requirements of form. It was necessary, therefore, to qualify the rule of the common law as to the effect of statutes, and section 174 of the Code was inserted for that purpose. The general intention of this section is to render the statutory rules of practice equally flexible with those which the courts had established to regulate their proceedings. It declares, among other things, that the court may, in its discretion and upon such terms as may be just, "supply an omission in any proceeding," and that "whenever any proceeding taken by a party fails to conform in any respect to the provisions of this Code, the court may, in like manner and on like terms, permit an amendment of such proceeding, so as to make it conformable thereto."

There was always a time after which a party who had recovered a judgment was not at liberty to sue out execution without an application to the court. Formerly, the time was a year and a day; and the form of obtaining an award of execution, when one had not been issued in time, was by *scire facias quare executionem non*. Afterwards it was extended by the Revised Statutes to two years. (2 R. S., 363, § 1.) By the Code it was further extended, as we have seen, to five years, and the mode of obtaining leave was an application to the court on motion. Under the former practice, it was well settled that the execution, if issued too late, was not void. *Woodcock v. Bennet*, 1 Cow., 711. It was liable to be set aside on motion, but such motion, like all others, must be made promptly; and if it appeared that the defendant had consented to the execution being issued, or if there were any circumstances

which in fairness and equity precluded him from availing himself of the irregularity, the motion would not prevail. *Morris v. Jones*, 2 Barn. & Cres., 232. There is no reason why the same practice should not obtain under the Code. The section above cited would enable the court, in its discretion, to relieve the plaintiff, and to uphold the execution, though irregularly issued, upon such excuse as it should consider satisfactory, and subject to such terms and conditions as it might think fit to impose.

The question, therefore, whether this execution ought to have been set aside, addressed itself to the discretion of the Supreme Court, and it was a matter of practice of the same nature with the mass of questions relating to the regularity of proceedings which daily come before that court. If the motion which was made to set it aside was a summary application after judgment, the decision was not an order affecting a substantial right within the 3d subdivision of section 11 of the Code. It related to the form and order of proceedings, and was the exercise of the jurisdiction of the court to control and regulate its process. Orders in such cases are not the subjects of appeal here.

SELDEN and HARRIS, Js., were absent; all the other judges concurring, *Appeal dismissed.*<sup>1</sup>

GOWAN v. FOUNTAIN *et al.*

SUPREME COURT OF MINNESOTA. 1892.

[Reported 50 *Minnesota*, 264.]

APPEAL by plaintiff, Mary M. Gowan, from a judgment of the District Court of Chippewa County, Powers, J., entered December 31, 1891.

On November 4, 1881, plaintiff recovered judgment in the District Court of Swift County against Hannah J. Bense, for \$1,014.49. This judgment was docketed in Chippewa County on December 2, 1889. A writ of execution was issued on November 26, 1889, and delivered to plaintiff's attorney, together with a transcript of the judgment, with directions to file the transcript with the Clerk of the Court in Chippewa County, and then fill up the blank date of doing it in the execution, and hand it to the Sheriff

<sup>1</sup> *Mariner v. Coon*, 16 Wis. 465, *accord*. Compare *Blanchenay v. Burt*, 4 Q. B. 707. See 1 *Freeman*, Executions, 3d ed., sec. 29; 8 *Encyc. of Pl. & Pr.* 360.

As to the validity of a levy executed after the return day of the writ, see *Hathaway v. Howell*, 54 N. Y. 97; 8 *Encyc. of Pl. & Pr.* 493-496. — ED.

of that county. This was done, and he levied upon and sold Mrs. Bensel's hotel property in Montevideo, to the plaintiff. The property was not redeemed, and this action of ejectment was begun against Mrs. Bensel and her tenants, the other defendants Joseph Fountain and Jennie Fountain. R. W. Dunn died in 1879, seised of this hotel property, and occupying it as his homestead. His widow married a Mr. Bensel, and in 1885 removed from the hotel onto a farm. Defendants had judgment that the execution sale was void and that Mrs. Gowan take nothing.

MITCHELL, J. The only questions raised by this appeal involve the validity of the execution sale under which plaintiff claims title to the real estate in controversy.

Judgment was rendered and docketed in the district court in and for Swift county in favor of the plaintiff and against the defendant Bensel.

The clerk of the court in that county "issued" (to use the language of the findings) an execution on the judgment directed to the sheriff of Chippewa county (in which the land in question is situated), in which the date of docketing the judgment in the latter county was left blank, and at the same time "issued" a transcript of the judgment, and delivered both to plaintiff's attorney, with directions to him to have the date when the judgment should be docketed in Chippewa county inserted in the execution before it was delivered to the sheriff for service. The attorney transmitted both to the clerk of the court of Chippewa county, with instructions, after the transcript was filed, and the judgment docketed in that county, to insert the date of such docketing in the execution. Pursuant to these instructions, the clerk in Chippewa county filed the transcript, and docketed the judgment, and inserted the date thereof in the execution, and returned it to the attorney, by whom it was thereafter delivered for service to the sheriff of Chippewa county, who proceeded thereunder to levy upon and sell the land in question. It will be observed from this that the judgment had been docketed in Chippewa county before the execution was delivered to the sheriff, and that the fact and date of such docketing were then correctly stated therein.

The line of reasoning by which it is sought to establish the proposition that this execution was void is substantially as follows: That at common law all process of courts is limited to the territory over which their jurisdiction extends; that the territorial jurisdiction of the district court in and for a particular county is limited to the county in which it is held; that, therefore, the district court has



no authority to issue an execution to another county, except that conferred by statute, which is limited to counties where the judgment is docketed (1878 G. S. ch. 66, § 299); that consequently such docketing is a condition precedent to the authority to issue an execution, which jurisdictional fact must appear on the face of the execution when issued (*Id.* § 295); that this execution, having been issued before the judgment was docketed in Chippewa county, was absolutely void. This is substantially the line of reasoning advanced by Justice RYAN, speaking for the court, in *Kentzler v. Chicago, M. & St. P. Ry. Co.*, 47 Wis. 641 (3 N. W. Rep. 369). We do not find it necessary to determine in this case whether it is sound or not. We may remark, however, that it seems to us more severely logical than practical, and we are by no means clear that under our judicial system it is correct to say that the territorial jurisdiction of the district court is limited to the county in which it sits, especially in view of the provisions of 1878 G. S. ch. 64, § 3.

But, conceding the soundness of the doctrine, its applicability to the present case depends upon the assumption that this execution was *issued* at the date on which it was made out by the clerk of the court of Swift county, and by him delivered to plaintiff's attorney. If this premise is false, of course the conclusion falls with it. The delivery to the attorney was not unqualified, but only provisional and conditional; the condition being that the judgment should be docketed in Chippewa county, and the date thereof inserted in the execution before it was delivered to the sheriff for service. It was issued, in the sense of being taken from the clerk's office, before the judgment was docketed in Chippewa county, but the judgment was docketed in that county before the execution was issued in the sense of being delivered to the sheriff for service; and this is, in legal contemplation, the date of the issue of an execution. This was, in substance, what was held in *Mollison v. Eaton*, 16 Minn. 426 (Gil. 383). It is true that in that case the levy was on personal property, but, as respects the authority to issue an execution to another county, we cannot see how that makes any difference. The practice adopted in the present case has obtained in this state from a very early date. It is an eminently convenient one, and injures nobody. Our conclusion, therefore, is that the execution and the sale under it were valid.

The land in question was, at the time of his death, the homestead of defendant Bensel's deceased husband, and as such she had a life estate in the property. She occupied it as her homestead for some time after her husband's death; but several years before the



levy under plaintiff's execution she had ceased to occupy it, and had removed to another place, which she has ever since occupied as her home. This constituted an abandonment of the premises as a homestead unless she had filed the notice required by statute. Of this there was no proof, and the burden of proving it, if the fact existed, was on her. Having been the homestead of her husband, her life estate in the land was not subject to his debts; but to exempt it from her own debts she must have occupied it as her homestead, precisely as any one else has to do.

Judgment reversed, and cause remanded, with directions to enter judgment for the plaintiff for the possession of the premises, and for damages for withholding the same since the commencement of the action in accordance with the findings of fact.<sup>1</sup>

### HUNT v. LOUCKS.

SUPREME COURT OF CALIFORNIA. 1869.

[Reported 38 *California*, 372.]

SANDERSON, J. delivered the opinion of the Court.<sup>2</sup>

The plaintiff claimed title founded upon a sale under an execution, to which neither he nor the defendant's lessor was a party. In support of his claim he produced at the trial a judgment, execution and Sheriff's deed. To this testimony the defendant demurred, upon three grounds: First — That the execution was void, because it varied materially from the judgment; Second — That it was void, because it appeared upon its face to have been issued upon two separate judgments; Third — Because the return, endorsed upon the execution, did not show a sufficient levy.

In view of these objections, the Court below excluded the testimony, and the plaintiff was accordingly nonsuited. Whether this testimony ought to have been admitted, is the only question presented for our consideration.

*First* — The ground of the first objection was, that the execution called for \$695 more than the face of the judgment. Was it for that reason void, and therefore the sale also? We think it was only voidable, and therefore the sale valid.

<sup>1</sup> See *McDonald v. Fuller*, 11 S. D. 355, 77 N. W. 581.

As to the validity of process issued subsequently to the entry of judgment but prior to the time authorized by statute or rule of court, see *Penniman v. Cole*, 8 Met. (Mass.), 496; *Bacon v. Cropsey*, 7 N. Y. 195. — Ed.

<sup>2</sup> A part of the opinion is omitted. — Ed.

It cannot be denied that to sustain a title founded upon a Sheriff's sale, a judgment must be produced; an execution, which the Judge can affirm, was issued upon the judgment produced, and a deed which was given in pursuance of the execution and the sale under it. Unless it appear that the judgment, execution and deed are links of the same chain, the title will fail. But a question of variance between them must not be confounded with the question of their validity. The two propositions are quite separate and distinct. The former is a question of identity only — the latter assumes or concedes the identity, and goes only to the validity of the suspected instrument. If the execution differs so materially from the judgment that the Judge cannot affirm that the former was issued upon the latter, his conclusion is, not that the execution is void, but that it was not issued upon the judgment which has been exhibited with it. The conditions upon which the two questions arise, are not only different, but the question of void, or voidable, does not arise until the question of variance has been considered.

That this execution was issued upon the judgment which was exhibited with it does not admit of a rational doubt. The recitals in the execution correspond with the judgment in every particular, except as to the amount; the Court, the date, the parties, the general character of the judgment, are all correctly stated in the execution; and it is not pretended that there is, or was, any other judgment of the same Court, of the same date, between the same parties and of the same general character upon which the execution could have been issued. Such being the case, there is no rational ground for saying that the judgment and execution are not parts of the same judicial proceedings; and we do not understand counsel as disputing this proposition, but as conceding it, and insisting only that the execution is void, because it calls for too much money.

That, as a general rule, an execution must follow the judgment, and conform to it, and that if it varies materially from it, it will be set aside, or quashed, or amended, as the case may be, upon the motion of the parties to it, who are prejudiced by the error, is undoubtedly true, as appears by the cases cited by counsel. But, that and nothing more being shown, we have made but little progress in the present case. The question is not as to what the Court would have done with this execution if the defendants in the judgment had moved to set it aside — to quash, or amend it, as they might have done. If such was the question, it could be readily answered. The Court would not have set it aside, but

would have allowed it to be amended so as to conform to the judgment; that is to say, it would have quashed it only as to the excess. *Stevenson v. Castle*, 1 Chit. 349; *King v. Harrison*, 15 East, 615; *Morriss v. Leake*, 8 T. R. 416, note a; *McCullum v. Hubbert*, 13 Ala. 282. But quite a different question is here presented — one which rests upon entirely different conditions, and involves altogether different principles: It is as to what ought to be done with such an execution when it comes before the Court collaterally as evidence of title in an action which is not even between the parties to the execution, but between entire strangers to it, and where it is not pretended that the execution was ever, at any time, even after the sale, set aside upon the application of the parties, who alone were injured by the error.

We understand the settled rule to be that if the execution be merely erroneous — that is to say, voidable — a sale under it to a *bona fide* purchaser will be valid, although the execution be afterwards set aside; but if the execution be irregular — that is to say, void — a sale under it, even to a *bona fide* purchaser, will also be void. *Woodcock v. Bennet*, 1 Cow. 711. . . .

That executions which are merely voidable cannot be attacked collaterally admits of no debate, where, as in this State, the common law controls the question. A collateral attack can no more be made upon an erroneous execution than upon an erroneous judgment. Like an erroneous judgment, an erroneous execution is valid until set aside upon a direct proceeding brought for that purpose; and, until set aside, all acts which have been done under it are also valid. In a collateral action, it cannot be brought in question, even by a party to it, much less, as in this case, by a stranger to it. Even directly it cannot be attacked by a stranger, for it does not lie in the mouth of A to say by it B has been made to pay too much money, and that therefore all proceedings under it are null and void. That is a question which concerns B only, and if he is content A cannot complain. Nor if B, who is bound to know of the variance between the judgment and the execution, does not interpose by motion for its correction, ought he to be allowed to question the title of a purchaser under it — it may be years afterward? He has a remedy by motion to amend, or by action to recover the excess of the levy from the plaintiff in the execution, and the Clerk, also; besides, with full knowledge of all defects, he has allowed the Sheriff, acting as his agent in the matter, to sell, and the purchaser to buy, without opening his lips, and in all fairness and justice to the latter, he must keep them closed forever.

Blood v. Light, present term; Jackson v. Bartlett, 8 John. 361; Jackson v. Robbins, 16 Id. 537; Mariner v. Coon, 16 Wis. 465; Elliott v. Knott, 14 Md. 121.

*Second* — The ground upon which the second objection to the execution rests is, that it included the costs of an appeal from the judgment to this Court. It was proper and regular that it should.

*Third* — The last objection rests upon the ground that the return endorsed upon the execution does not contain a report in detail of the acts of the officer in making the levy. It was not necessary that it should. If the return be defective for the reason suggested, or for any other reason, the purchaser would not be affected by the defect. Whether the return be good or bad, sufficient or insufficient, is a matter of no moment to the purchaser, for his title depends upon it in no respect whatever.

Judgment reversed and a new trial granted.

SPRAGUE, J., expressed no opinion.<sup>1</sup>

### MCCLURE v. LOGAN.

SUPREME COURT OF MISSOURI. 1875.

[Reported 59 *Missouri*, 234.]

SHERWOOD, J. In a proceeding to cancel certain deeds, the court below held that a purchaser, at a judicial sale, took no title to land purchased, although he purchased in good faith and without notice; that the judgment was satisfied prior to the sale, under the execution issued thereon.

The point was considered in *Reed v. Heirs of Austin*, 9 Mo., 722; but there was a division of opinion in regard to it; the majority of the court holding that the purchaser obtained a title notwithstanding the previous satisfaction of the judgment. The subject was not, however, extensively nor elaborately discussed, nor were the authorities cited in support of that view. *Jackson v. Caldwell*, 1 Cow., 622; *Jackson v. Anderson*, 4 Wend., 474, directly in point.

In the subsequent case of *Durette v. Briggs*, 47 Mo., 356, the matter underwent a more thorough discussion, when a conclusion in conformity to that arrived at by the trial court in the case at bar was reached. So, also, *Durfee v. Moran*, decided at our last August term, although containing other elements on which the decision of that case might have rested, yet on the point in hand arrives at the result just indicated.

<sup>1</sup> See Alderson, *Judicial Writs and Process*, secs. 49-55. — ED.



And though there is a conflict of authority in regard to the validity of a purchase made under the circumstances heretofore mentioned, it is confidently believed that the current of judicial opinion will be found in accord with that adopted by our own court, in its more recent decisions. *Ror. Jud. Sales*, § 722; *Jackson v. Morse*, 18 Johns., 441; *Wood v. Colvin*, 2 Hill, 566; *Carpenter v. Stillwell*, 11 N. Y., 61, *Craft v. Merrill*, 14 Id., 456; *Hammatt v. Wyman*, 9 Mass., 138; *King v. Goodwin*, 16 Id., 64; *Swan v. Saddlemire*, 8 Wend., 676, and cases cited.

The principle on which these decisions rest, is that the existence of the debt, whose collection is the sole object of the issuance of the *fi. fa.*, is the basis on which the power to sell alone depends; that when the debt is extinguished, the authority under and virtue of the execution dies with it, and that he who buys under a power buys at his peril, and takes nothing by his purchase if the alleged power does not exist. And no good reason is perceived, why the same principle is not applicable in a case like the present, as would be applied to one where the authority is conferred by the act of the parties rather than that of the law.

If the principal is dead, although the purchaser is unaware of the fact, and acts in the most perfect good faith, yet his purchase from the agent is a nullity and no title ensues therefrom. Such hazards are the inevitable incidents which attend the doings of all acting under delegated powers, whether conferred by some private person or by the law.

There were none of the ingredients of an equitable estoppel in this case. The plaintiff, who resides in Louisville, Ky., had settled up the judgment and all costs in full, in October, 1869, and the sale did not take place until the following April; and having the judgment satisfied under the agreement devolved entirely on the plaintiff in the judgment, and on its agents. There is no ground then to impute laches in this regard to McClure, or to hold him estopped by a state of facts of which he was wholly ignorant.

The judgment is affirmed, all the judges concur.<sup>1</sup>

#### STATUTE 13 EDWARD I, CHAPTER 17. (1285.)

[1 *Statutes at Large*, 194.]

WHEN Debt is recovered or knowledged in the King's Court, or Damages awarded, it shall be from henceforth in the election of

<sup>1</sup> *Luddington v. Peck*, 2 Conn. 700; *Williams v. Gill & Co.*, 6 J. J. Marsh. (Ky.), 487, *contra*. See 1 Freeman, Executions, 3d ed., sec. 19; 8 Encyc. of Pl. & Pr. 323. — Ed.

him that sueth for such Debt or Damages, to have a Writ of *Fieri Facias* unto the Sheriff for to levy the Debt of the Lands and Goods, — or that the Sheriff shall deliver to him all the Chattels of the Debtor (saving only his Oxen and Beasts of his Plough) and the one half of his Land, until the Debt be levied upon a reasonable Price or Extent. And if he be put out of the Tenement, he shall recover by a Writ of *Novel disseisin*, and after by a Writ of *Redisseisin*, if need be.

STATUTE 29 CHARLES II, CHAPTER 3. (1676.)

[8 *Statutes at Large*, 408.]

XIII. And<sup>a</sup> whereas it hath been found mischievous, that judgments in the King's Courts at Westminster do many times relate to the first day of the term whereof they are entred, or to the day of the return of the original, or filing the bail, and bind the defendants lands from that time, although in truth they were acknowledged or suffered and signed in the vacation-time after the said term, whereby many times purchasers find themselves agrieved:

XIV. Be it enacted by the authority aforesaid, That from and after the said four and twentieth day of June [1677] any judge or officer of any of his Majesty's courts at Westminster, that shall sign any judgments, shall at the signing of the same, without fee for doing the same, set down the day of the month and year of his so doing, upon the paper book, docket or record which he shall sign; which day of the month and year shall be also entred upon the margent of the roll of the record where the said judgment shall be entred.

XV. And be it enacted, That such judgments as against purchasers *bona fide* for valuable consideration of lands, tenements or hereditaments to be charged thereby, shall in consideration of law be judgments only from such time as they shall be so signed, and shall not relate to the first day of the term whereof they are entred, or the day of the return of the original or filing the bail; any law, usage or course of any court to the contrary notwithstanding.

XVI. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June no writ of *Fieri facias* or other writ of execution shall bind the property of the goods against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff or coroners to be executed: and for the bet-

ter manifestation of the said time, the sheriff, under-sheriff and Coroners, their deputies and agents, shall upon the receipt of any such writ (without fee for doing the same) endorse upon the back thereof the day of the month or [and] year whereon he or they received the same.

STATUTE 5 GEORGE II, CHAPTER 7. (1732.)

[16 *Statutes at Large*, 272.]

WHEREAS his Majesty's subjects trading to the British plantations in America lie under great difficulties, for want of more easy methods of proving, recovering and levying of debts due to them, than are now used in some of the said plantations: and whereas it will tend very much to the retrieving of the credit formerly given by the trading subjects of Great Britain to the natives and inhabitants of the said plantations, and to the advancing of the trade of this kingdom thither, if such inconveniences were remedied, . . .

IV. And be it further enacted by the authority aforesaid, That from and after the said twenty ninth day of September, one thousand seven hundred and thirty two, the houses, lands, negroes, and other hereditaments and real estates, situate or being within any of the said plantations belonging to any person indebted, shall be liable to and chargeable with all just debts, duties and demands of what nature or kind soever, owing by any such person to his Majesty, or any of his subjects, and shall and may be assets for the satisfaction thereof, in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings and process in any court of law or equity, in any of the said plantations respectively, for seizing, extending, selling or disposing of any such houses, lands, negroes, and other hereditaments and real estates, towards the satisfaction of such debts, duties and demands, and in like manner as personal estates in any of the said plantations respectively are seized, extended, sold or disposed of, for the satisfaction of debts.

## PORTER'S LESSEE v. COCKE.

SUPREME COURT OF ERRORS AND APPEALS OF TENNESSEE.  
1823.

[Reported *Peck*, 30.]

BROWN, J. The questions presented for determination by this case are, first, is a judgment a lien on the lands of the debtor; second, if a judgment be a lien on the lands of the debtor, in what manner may this lien be suspended or discharged; and, thirdly, if Porter's judgment was not a lien, or that lien were by any means destroyed before the sale under his judgment, and if the sale to Thomas Cocke was fraudulent, whether he is not protected by the statute of limitations?

By the common law, lands and tenements were not subject to be taken in execution at the suit of a common person, except in case of an heir; to remedy this obvious defect, came the 13th Ed. 1, ch. 18, by which it is provided, that when a debt is recovered or acknowledged in the king's court, or damages awarded, it shall be from thence forth in the election of him to have a writ that the sheriff *feri faciat* of the lands and goods, or that the sheriff shall deliver to him all the chattels of the debtor &c. and the one half of his land, until the debt be levied upon a reasonable price in extent. Upon this is founded the writ of *elegit*, by which all the goods of the debtor are delivered, at their approved value, into the hands of the creditor, and the one half of his lands are extended. There is nothing in this statute which indicates the time from which the land shall be bound, but by construction of the court immediately after its enactment, and ever since, the judgment has been held to bind the land, and the plaintiff might have execution of the lands, which defendant had at the time of the judgment, although he had aliened them *bona fide* before execution awarded. This construction was adopted the more effectually to secure the just rights of creditors, and its propriety and justice have never been questioned or rendered doubtful by the experience of centuries. This is the law which the colonists brought with them from the mother country, and is yet the law unless changed by statute. A short time was sufficient to convince the inhabitants of the colonies, and those with whom they had commercial transactions, that the *elegit* was wholly insufficient, as a process, to enforce the payment of

<sup>1</sup> Only the opinion on this point is given. — Ed.



debts. Much of the lands held by debtors, was wild and uncultivated and would be an annual incumbrance to the creditor, instead of procuring any annual profit. Such lands as were improved had no fixed or certain annual value, difficult to rent, and would probably produce nothing unless the creditor would become the occupier, which was not often convenient. Thus, in fact, the lands of the debtor though of considerable intrinsic value, were totally beyond the reach of the creditor. Again; the progress of commerce, the gradual decline of feudal notions and principles, and a more enlightened view of the relative rights and duties of men, had shewn, that no part of the debtor's property should be withheld from the satisfaction of his debts, to aid the creditor by subjecting all the debtor's real estate to legal process for the payment of debts, and to change the process, making such estate liable to sale instead of extent, was enacted by the statute of 5 Geo. 2, ch. 7, sec. 4, in these words.

"And be it further enacted by the authority aforesaid, that from and after the 29th day of September, 1732, the houses, lands, negroes, and other hereditaments, and real estate, situate or being within any of the said plantations, belonging to any person indebted, shall be liable to, and chargeable with, all just debts, duties and demands of what nature or kind, soever, owing to any such person, to his majesty, or any of his subjects; and shall be assets for the satisfaction thereof in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty; and shall be subject to the like remedies, proceedings and process in any court of law or equity in any of the said plantations respectively for seizing, extending, selling or disposing of any such houses, lands, negroes, and other hereditaments and real estate towards the satisfaction of such debts, duties and demands, and in like manner as personal estate in any of the said plantations respectively are seized, extended, sold or disposed of for the satisfaction of debts."

When examining this statute with a view to the determination of the present question, I admit it should be read as if the words "and shall be assets for the satisfaction thereof, in like manner as real estates are by law of England, liable to the satisfaction of debts due by bond or other specialty," were not in the section, because they do most clearly relate to a different subject, to which the comparison there made is peculiarly, and alone applicable, and thus far entirely agrees with the supreme court of North Carolina in the case of — *v. —*, Murph. Rep.

The first provision in the section is, that all the lands &c. of persons indebted, shall be liable to, and chargeable with, all just debts, &c. The last is, that the lands, &c. shall be subject to be seized extended, sold or disposed of, by any process in any court, &c. in like manner as personal estates are seized, extended, sold or disposed of, for the satisfaction of debts.

It may now be remarked that the *elegit* is not taken away from the creditor by this statute, but on the contrary, is in express terms recognized and preserved.

If the first provision had stood alone, the effect would have been simply to subject all the debtor's real estate to be extended under the *elegit*, and in that case it would not probably be contended by any one that the binding force of the judgment was affected; nor would it be denied that, taking the whole section as it stands, the judgment would bind the lands if the creditor elected to have the writ of *elegit*. But it is argued that the last provision destroys the lien of the judgment if the party resorts to a sale of the land, and that when the *fi. fa.* is applied to the sale of land by this section, all the incidents, effects, and consequences of the *fi. fa.* which attend it when applied to the sale of personal property, are necessarily introduced. That such was the intention of the legislature is evinced by their reference to the sale of personal estate; that the *fi. fa.* only binds goods from the test and therefore lands should only be bound from the test of the *fi. fa.* when it is used to subject them.

We will examine these objections, and to do this satisfactorily, we will see, first, whether there is anything in the statute of Westminster which creates this lien; second, if not, whether there is anything in the writ of *elegit* which produces this effect; third, why the *fi. fa.* only binds from the test, and the points in which the *elegit* and *fi. fa.* agree and differ, from all which we shall perceive upon what basis the lien of a judgment does rest, and whether the *fi. fa.* destroys that basis.

We have already seen that there are no express words in the stat. West. which indicates the binding effect of the judgment on lands; the same words are used with regard to goods and chattels, as lands. It is true, in the writ of *elegit* now generally in use, the sheriff is directed to deliver such lands as the defendant was seized of, on the day of the rendition of the judgment. This direction is only to inform the sheriff of the construction of law made upon the statute, and is merely a consequence of such construction. 7th Co. Rep. 131, Sellington's case; for many writs of *elegit* are to be found

in books of most approved authority, where this direction is altogether omitted, Fitz. N. B. 594, (266 in mar.) 2, Saund. Rep. 68; and the forms of writs used in judicial proceedings, Lord Coke tells us are only the evidence of what the law is and do not make the law, nor are the reasons of it. The writ in this case, was framed to carry into effect the statute, with such construction as the courts had given to it.

Now we will examine whether the lien of the judgment has any dependence on the process used to execute it, or whether the form of the execution can so far retrospect upon the judgment as to confirm or destroy its force; for if it should be found that the lien of the judgment in England does depend on the *elegit*, then the argument is fair to say, that when this writ is not used, the lien is relinquished; but, if the lien of the judgment has no connection with the execution used, and depends upon other circumstances and reasons, then we may fairly conclude that the substitution of the *fieri facias* for the *elegit* was not intended, nor does destroy, the lien of the judgment.

The *elegit* directs the sheriff to deliver to the creditors all the goods and chattels of the debtor except oxen and beasts of the plough, and also a moiety of his lands and tenements.

Here, then, is the same execution directed against several species of property, and if the binding effect of this judgment depend on the writ, all will be bound in this case by the judgment. The lands are bound; yet it has been held by a series of adjudged cases from the year books down to this time, that the goods and chattels are bound in this case only from the test of the *elegit*; 1 Roll. Ab. 893; 8 Co. Rep. 171, Fleetwood's case; 3 Atk. Rep. 200, Shiley v. Watts; Sug. on Ven. 474; Gilb. on Ev. 33. Again, a term for years, may by the sheriff under an *elegit*, either be extended, that is, he may deliver a moiety thereof to the plaintiff under the words in the statute, *medietatem terræ suæ*, 2 Inst. 396; 8 Co. 171; Gilb. on Ev. 35; or may sell the whole term to the plaintiff as part of the personal, at a gross price approved by the jury. A term for years may also be sold at common law under a *fieri facias*. Now, this is a case which will most conclusively shew whether the execution used has any effect upon the judgment, or creates, or in any manner affects, the lien. Here whether the *elegit* or the *fieri facias* be issued; whether the term be extended or sold, the property is only bound from the time execution is awarded; Sug. on Ven. 494; 8 Co. 171; 3 Atk. Rep. 200. This was the common law with regard to the *fieri facias*, and when the term was



made extendible under the *elegit*, the change of process effected no change in the lien; the *fieri facias* bound goods and chattels from its test, because they were goods and chattels, and on account of the nature of the property, and for this reason alone was it, that the *elegit* was held to bind goods only from the test, and upon this reasoning was it held that a lease-hold was not bound by the judgment, because it was a chattel, because it was goods; Sug. on Ven. 494, 5; and if the *elegit* binds to precisely the same extent with the *fieri facias*, when levied on personal estate, can any reason be given why the *fieri facias* when levied on personal estate, should destroy the lien of the judgment when made to operate on freehold estate? I believe no reason founded on authority or justice can be rendered why it should have such effect, and by all just analogy when the *fieri facias* is levied on freehold estate, then it should, as the *elegit* does, conform itself in its operation to the nature of the property brought within its reach, 2 Bac. Ab. 700; 2 Roll. 472; and should truly execute the judgment to such extent as it operates upon the rights and property of the respective parties to it. Therefore I conclude as the writ of execution employed has, in the cases adduced, had no effect either to extend or limit the binding force of the judgment, that when the act of 5 Geo. 2, ch. 7, sec. 4, gave to the creditor the right to sell the debtor's and under the *fieri facias* instead of extending it under the *elegit*, it was not intended by a change of process to change and limit the effect of the judgment.

The whole statute is made to extend the rights of the creditor, to secure to him the power of collecting his debt; and it would be singular, indeed, if, at the time the legislature gives to the creditor the benefit of the *fieri facias* upon lands, it intended to annex a condition to its use which might, and in many cases would altogether defeat the collection of his debt.

The uniform course of judicial dicta, coming from judges of considerable learning and experience, although not amounting to authority, are yet entitled to much respect and tend to give greater confidence in the opinion now expressed. By the act of 1799, ch. 14, sec. 2, the legislature of this state have recognised the binding force of a judgment on lands, and have so limited this lien as to prevent any serious injury to purchasers *bona fide* from the judgment debtor.<sup>1</sup>

<sup>1</sup> For the effect of a judgment as a lien on land of the judgment debtor, see 1 Black, Judgments, 2d ed., Chap. XVI; 2 Freeman, Judgments, 4th ed., Chap. XIV.

In England by the statute 27 and 28 Vict. c. 112 no judgment affects land



## CALIFORNIA CODE OF CIVIL PROCEDURE.

Sec. 671. Immediately after filing the judgment-roll, the clerk must make the proper entries of the judgment, under appropriate heads, in the docket kept by him; and from the time the judgment is docketed it becomes a lien upon all the real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may thereafter acquire, until the lien ceases. The lien continues for five years, unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking as provided in this code, in which case the lien of the judgment and any lien by virtue of an attachment that has been issued and levied in the action ceases.

Sec. 674. The transcript of the original docket of any judgment, the enforcement of which has not been stayed on appeal, certified by the clerk, may be filed with the recorder of any other county, and from such filing the judgment becomes a lien upon all the real property of the judgment debtor not exempt from execution in such county, owned by him at the time, or which he may afterward, and before the lien expires, acquire. The lien continues for two years unless the judgment is previously satisfied or the lien otherwise discharged.

EAVES *v.* GARNER *et al.*

SUPREME COURT OF GEORGIA. 1900.

[Reported 111 *Georgia*, 273.]

FISH, J. C. C. Eaves brought his action against J. F. Garner, J. G. Weaver, and B. F. Morgan, for damages which he alleged he had sustained by reason of the defendants having entered upon his land and cut and carried away certain timber. Upon the trial, to prove his title to the land, plaintiff offered in evidence a sheriff's deed thereto, made in pursuance of a sale under an execution issued from a justice's court. He also offered in evidence a copy of such execution, with the entries thereon, the original having been lost. The following entry appeared on the copy *fi. fa.*: "I know of no personal property in the possession of the defendant, on which to

so as to be a charge on it until it has been actually delivered in execution by the sheriff, and the writ is required to be registered. See Williams, Real Property, 22d ed., pp. 271-281. — Ed.

levy this *fi. fa.* This 14th day of February, 1848. James S. Tribble, Cons." The court excluded the copy *fi. fa.*, and the plaintiff excepted.

Section 4167 of the Civil Code, which is a codification of the act of 1811, provides that "No constable shall levy on any land unless there is no personal property to be found sufficient to satisfy the debt, which fact must appear by an entry on the execution, to be levied by a constable of the county where such execution was issued, or where the property to be levied upon may be found." The entry of the constable upon the *fi. fa.* in this case did not comply with this section of the code. Instead of an entry of no personal property to be found, which seems to imply that the constable should make some search for such property, he made an entry that he knew of no personal property in the possession of the defendant on which to levy the *fi. fa.* The defendant may have owned sufficient personalty to satisfy the execution, which at the time of this entry was in possession of some one else, and the constable may have known this fact, and yet his entry would be true. There was no error, therefore, in sustaining the objection to the introduction of the *fi. fa.* in evidence. There seems to have been no objection to sheriff's deed going in evidence, but, as the plaintiff offered no other evidence, the court did not err in granting a nonsuit. *Judgment affirmed. All the Justices concurring.*<sup>1</sup>

## PENHALLOW v. DWIGHT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1810.

[Reported 7 *Massachusetts*, 34.]

TRESPASS for breaking and entering the plaintiff's close, and cutting down and carrying away his corn there growing.

The parties submitted the cause to the determination of the Court upon an agreed statement of facts. The defendant, at the time when, &c., was a constable of Belchertown, in which the *locus in quo* was situated, and he entered the close, and cut and carried away the plaintiff's corn thereon growing, and then fully ripe and fit to be gathered; claiming authority so to do, by virtue of an execution to him directed, then in full force, and issued in due form of law, upon a judgment of the Court of Common Pleas, for

<sup>1</sup> See 2 Freeman, Executions, 3d ed., sec. 279; 8 Encyc. of Pl. & Pr. 514. — Ed.

the county of Hampshire, against the plaintiff, and in favor of one Eldad Parsons. The said corn being sold by the defendant at publick auction, according to law, produced the sum of 22 dollars, 49 cents, which sum, after deducting his fees, and the expenses of gathering the corn, the defendant endorsed on the said execution. If the court should be of opinion, that the defendant had a right, by virtue of the authority aforesaid, to enter the said close, and cut and carry away the plaintiff's corn, in manner and for the cause aforesaid, it was agreed that judgment should be rendered for the defendant for his costs; othrewise for the plaintiff, for 25 dollars damage, with his costs.

*Curia.* As the defendant had the right, and indeed was obliged by the duty of his office, to enter the close of the plaintiff, and to seize any personal property of the plaintiff, whereby he might satisfy the execution he then held against the plaintiff; the only question is, whether corn, then in a proper state to be gathered, but found standing, might lawfully be cut down and disposed of, to raise the money due upon the execution. And we have no doubt that corn, or any other product of the soil, raised annually by labor and cultivation, is personal estate; and would go to the executor, and not to the heir, on the decease of the proprietor. It is therefore liable to be seized on execution, and may be sold as other personal estate.

An entry for the purpose of taking unripe corn, or other produce which would yield nothing, but in fact be wasted and destroyed, by the very act of severing it from the soil, would not be protected by this decision.

Let the defendant have judgment for his costs.<sup>1</sup>

#### ALBRECHT and others *v.* LONG and others.

SUPREME COURT OF MINNESOTA. 1878.

[Reported 25 *Minnesota*, 163.]

GILFILLAN, C. J.<sup>2</sup> The defendant Long was sheriff of the County of Waseca, and Stevenson was his deputy; executions issued against the property of Sherwins were delivered as follows: One in favor of Charles Shedd, to the sheriff himself, at 10.30 o'clock P.M.

<sup>1</sup> Compare *Davidson v. Waldon*, 31 Ill. 120; *Cheshire Nat. Bank v. Jewett*, 119 Mass. 241.

A leasehold interest in land may be levied upon and sold upon a *fiери facias*. *Dulzell v. Lynch*, 4 W. & S. (Pa.), 255. — Ed.

<sup>2</sup> Only the opinion of the court is here given. — Ed.

of March 19, 1877; one in favor of Chancy Hardin *et al.*, and another in favor of J. S. Ricker *et al.*, to the sheriff in person, at 2 o'clock A.M. of March 20; and one in favor of these plaintiffs, to the deputy, at 6 o'clock A.M. of the same day. The deputy levied this last execution at half-past six A.M. of the same day, and took possession of the property. About half an hour thereafter, the sheriff levied the three executions delivered to him in person, upon the same property, and, upon his request, the deputy delivered to him the plaintiff's execution, and the possession of the property. The sheriff advertised the property for sale under several executions, not naming either of them, and sold the property, and applied the proceeds, after deducting his fees, to the payment in full of the Shedd execution, and the remainder upon the execution of Hardin *et al.*, and returned the plaintiff's wholly unsatisfied, whereupon plaintiffs bring suit against the sheriff and the sureties in his official bond.

The question presented is, whether the levy of an execution gives the execution creditor a lien upon the property, which entitles him to priority over other executions in the hands of the same officer against the same debtor, delivered to the officer before, but not levied till after, his? For these executions are all to be taken as delivered to the sheriff. The deputy is not an officer having a separate official existence from that of the sheriff. He is an officer of the sheriff's, whose powers and duties, so far as they affect the public, it is true, are defined by law. But he holds the office at the pleasure of the sheriff, is appointed and removable by him, and civilly responsible to him, and not to the parties whose writs come into his hands. He must act in the name of the sheriff, and not in his own name. All his acts are, in law, the acts of the sheriff; and the responsibility, civilly, for such acts done within his authority, is that of the sheriff. Our statutes do not, as do the statutes of some of the states, alter in any way the status of the deputy.

It is the duty of the sheriff, upon a writ coming into his hands, to use due diligence in the execution of it. It attaches to the writs as they come into his hands, and it follows that it is his duty to execute first those which are first delivered to him. Upon several executions in favor of different creditors against the same debtor, it is his duty to the creditor in that first delivered, to execute that first; and to the creditor in the second, to execute that second; and so through them all. This is the duty he owes to the several creditors. But the rights of the creditors, as against each other, are not necessarily controlled by it.



At the common law, an execution bound the goods of the debtor from the time of the *teste*, even though they were subsequently transferred to a *bona-fide* purchaser. The statute 29 Charles II., c. 3, § 16, provided that the execution "shall bind the property of the goods against which such writ of execution is sued out, but from the time that such writ shall be delivered to the sheriff, under-sheriff or coroner, to be executed." Under the common-law rule, the execution operated as a lien in favor of the creditor for the satisfaction of his debt, from the time of the *teste*, and, under the statute, it operated as such lien from the time of its delivery to be executed. And the latter would continue to be the rule, were it not for the provisions of the statute of this state. Gen. St. c. 66, § 269, enacts that "until a levy, property not subject to the lien of the judgment is not affected by the execution." So that the creditor acquires a lien on the property, by virtue of his execution, only from the levy. The property is not affected by the *teste*, nor the delivery to the sheriff. The levy fixes the rights of the creditor as to the specific property. It is argued that the statute 29 Charles II., and the General Statutes were passed only for the protection of *bona-fide* purchasers, and therefore do not affect the rights of execution creditors as against each other. If this were so, their rights would be controlled by the common-law rule, that the execution binds the goods from its *teste*, and the execution last delivered and levied might take precedence of all the others, because of the priority in its *teste*. We do not think the statute was intended to operate only as between the execution creditor and a *bona-fide* purchaser, as claimed, but it was intended to define absolutely, as its language indicates, the rights of the creditor as to the specific property, and as between him and all others.

The execution first levied, then, has the first lien on the property, though there may be others in the hands of the sheriff, which were delivered to him before the one levied. *Russell v. Lawton*, 14 Wis. 202; *Knox v. Webster*, 18 Wis. 406. The creditors in executions afterwards levied cannot claim to be paid out of the property, until the one first levied is satisfied. This would be so in a contest between the creditors, and it must be so in a dispute between the creditor having the first lien by levy, and the sheriff. The remedy of the creditor in the execution first delivered is against the sheriff. If the latter, through negligence, omit to levy the first execution till a second has been levied, and loss thereby accrues to the first execution creditor, an action will undoubtedly lie.

It does not follow, however, from the rule of law that a sheriff and his deputies are regarded as one officer, that where several executions against the same debtor are placed, some in the hands of the sheriff in person, and others in the hands of his deputy, and in consequence thereof, and without actual negligence of the sheriff or deputy holding the execution first delivered, a subsequent execution is first levied, that the sheriff is liable to the creditor in the first execution. When it comes to a question of diligence, the law recognizes the fact that the sheriff and his deputy are different persons, though in theory one officer. And as it does not require impossibilities, it regards the question of diligence in view of that fact, and of what may naturally happen in consequence of it. *Russell v. Lawton*, 14 Wis. 202; *Whitney v. Butterfield*, 13 Cal. 335.

*Order reversed, and new trial ordered.*<sup>1</sup>

WISE v. DARBY, Administrator, &c.

SUPREME COURT OF MISSOURI. 1845.

[Reported 9 *Missouri*, 130.]

NAPTON, J. This was a motion made by Darby, the defendant in error, in the court of common pleas of St. Louis county, asking that court to instruct the sheriff to sell certain property levied on by virtue of an execution in favor of said Darby against M. & F. Steigers, and to apply the proceeds to the satisfaction of that execution.

The motion was resisted by the plaintiffs in error, who claimed the property, by virtue of executions in their favor, issued anterior to the executions in favor of the plaintiff in error, and first placed in the hands of the sheriff. Affidavits in support of the motion, and counter affidavits in behalf of plaintiffs in error, were read on the hearing of the motion. The court sustained the motion, and directed the proceeds of the sale to be paid over to the defendant in error.

It appears from the affidavits, and from the returns made upon each of the executions, that the execution in favor of Darby, adm'r of Gross, against M. & F. Steigers, issued on the 24th March, 1843, for the sum of about eight hundred dollars, and was placed in the

<sup>1</sup> In many jurisdictions section 16 of the Statute of Frauds is law. 2 Freeman, Executions, 3d ed., sec. 200. In many jurisdictions, however, as in Minnesota, the execution lien arises from the actual levy. *Ibid.*, sec. 201. — ED.

hands of the sheriff on the same day. At that time, the sheriff had in his hands two executions against the same parties, one in favor of S. Wise, and the other in favor of P. Wise, amounting to about seven hundred dollars; but annexed to each of the last mentioned executions, were written instructions by the plaintiff's attorney directing the sheriff not to levy, until ordered by said attorney. The defendant in error directed the sheriff to levy his execution forthwith, and the sheriff did so. On the evening of the same day, and before the inventory of the property levied on under the execution of Darby was completed, the attorney of the plaintiff in error went to the Sheriff, and tore off the written instructions appended to the executions, and directed an immediate levy on the same property. The Sheriff levied, made sale and returned the facts especially, bringing the money into court, to be paid over as the court should direct. . . .

The main question for determination is: where an execution is delivered to a sheriff, and the plaintiff or his attorney directs the officer not to levy, and a second execution is placed in the hands of the same officer, which is first levied, and the goods sold under both writs, which shall be first satisfied ?

Though the writ of execution binds the goods from the time it is delivered into the hands of the officer, the property of the defendant in the execution is not divested until he levies. As a consequence of this principle it has been held, that where two executions are delivered to the sheriff, and he levies and sells under the one last delivered to him, such sale passes a good title to the purchaser, and the only remedy of the plaintiff in the first execution is against the officer. *Smallecomb v. Buckingham*, 1 Salk. 321. And Lord Holt intimated in this case, that if the person who sued out the first writ concealed it in his hand, the sheriff may rightly make execution on another writ, which bears the last test, but came first to his hands. In such case the sheriff would not be responsible. This was before the Statute providing that writs should bind only from the time of their delivery. But where two writs of *fiery facias* were delivered to the sheriff on different days, and the levy was made under the second execution, but no sale actually made, the sheriff was held justified in paying over the proceeds to satisfy the first execution. *Hutchinson v. Johnson*, 1 Term R. 731.

In the case of *Payne v. Drew*, 4 East 523, a writ of sequestration issued from the court of chancery in June, 1800; eighteen months afterwards, and before the sequestrators had executed the writ, a writ of execution from the court of common pleas came to the



sheriff's hands, and it was held that the sheriff was not justified in returning *nulla bona* to the execution. Lord Ellenborough said, that where there were several authorities equally competent to bind the goods of a party when executed by the proper officer, they shall be considered as effectually, and for all purposes bound by that authority, which first actually attaches upon them in point of execution, and under which an execution shall have been first executed.

In the case now before the court, the execution in favor of the plaintiffs in error, first came to hand, and the execution of the defendant in error was first levied; and according to the case of *Hutchinson v. Johnson*, if the written instructions are thrown out of consideration the sheriff, notwithstanding his having levied first under the execution of defendant in error, should pay the proceeds to the plaintiffs in the first executions. The question then arises, did the lien of the first execution commence from the time of their delivery, or was that lien destroyed, or suspended by the acts of the plaintiffs in error?

In England, as well as in this country, the doctrine is firmly established, that where the creditor gives instructions to the officer, after a levy, to delay, or not to proceed on the execution, such execution is held to be fraudulent, and void as against a subsequent execution. *Whipple v. Foot*, 2 J. R. 416; *Storm v. Woods*, 11 J. R. 110; *Rew v. Barber*, 3 Cow. 279; *Edwards v. Harben*, 2 Term R. 596, 7 Mod. 37; *Russell v. Gibbs*, 5 Cow. 394.

This doctrine results from the principle, that the levy divests the property from the defendant, and that to leave such property in the possession of the defendant, by the connivance, or at the request of the plaintiff in the execution, would be fraud against subsequent executions. Would not the objections be as great to the conduct of a plaintiff, who when he delivers his writ, accompanies that delivery with a declaration that he does not desire it to be executed? The lien of an execution, is merely the right to have the property of the defendant subjected to the payment of that execution. This lien attaches by the delivery of the writ. But a lien which cannot be enforced, would seem to be a contradiction in terms; and if, as we have seen in the case of *Smallcomb v. Buckingham*, the judge was influenced in his determination by the fact that the plaintiffs in the first writ had told the sheriff he was in no haste (1 Salk. 320), much stronger would be the inference against the vitality of a lien, when the party interested actively interferes, and directs the officer not to levy. Is it not obvious that to uphold



such a lien, would be to open a door to fraud, and enable plaintiffs by collusion to protect the goods of their debtors from other executions?

If the property of the debtor is held by the first execution, notwithstanding the officer is directed not to levy it, and that execution is sufficient to cover all the property, the other creditors cannot sue out executions, so as to be available, and the property of the debtor is thus protected. Thus all the evils would arise, to suppress which, the courts established the rule, that the creditor should not interfere after a levy, and still retain his priority.

*Judgment affirmed.*<sup>1</sup>

PEASE *v.* PRICE.

SUPREME COURT OF IOWA. 1897.

[Reported 101 *Iowa*, 57.]

THIS is an action for judgment on three promissory notes, and on an account. An attachment was issued in the action, and levied upon certain farming implements and tools, as the property of the defendant. Defendant moved to discharge the attached property, as exempt to him as a farmer, which motion was sustained, and from the order discharging said property the plaintiff appeals.

*Affirmed.*

GIVEN, J. Defendant states, as the grounds of his motion, that he is a married man, the head of a family, a resident of Clayton county, Iowa; that his business is that of a farmer, and that the property levied upon is the same that he has heretofore used in his business of farming, and which he purposes, expects, and intends to continue to use in and about the business of farming; and that it is all the farm implements of which he was possessed at the time the same were seized. There is no dispute but that if, at the time of the levy, January 18, 1895, the defendant was a farmer, the property levied upon was exempt to him, under section 3072 of the Code. The evidence shows, without conflict, that defendant was engaged in the business of farming, and used the implements in question in that business, up to and for some years prior to the first of March, 1894, and that, having no farm of his own, he rented from others. In March, 1894, he and his family moved into the town of Strawberry Point, where they continued to reside at the

<sup>1</sup> *Gilmore v. Davis*, 84 Ill. 487, *accord.* — ED.

time of these proceedings. During that time defendant was engaged, to some extent, as a barkeeper in a saloon, and made some efforts to secure a place in which to start a saloon of his own. He testifies that the only reason why he was not using said implements as a farmer was that he had not been able to rent a farm suitable for the amount of help that he had in his own family. He says, "I have never abandoned the business of farming, but, upon the contrary, have always intended, and do now intend, to continue to follow and conduct the business of farming." The fact that he sought other employment during the time that he was unable to procure a farm, is not in conflict with this statement as to his intention. It appears that in December, 1894, the defendant advertised some of these articles for sale, but that act does not show that he did not intend to continue in the business of farming. It also appears that defendant said on one occasion that he had sold part of said implements to his son-in-law, but it does not appear that the sale, if ever made, was consummated. The articles were taken as the property of the defendant, and from his possession. Under the ruling announced in *Hickman v. Cruise*, 72 Iowa, 528 (34 N. W. Rep. 316), it is not necessary that the defendant should have actually engaged in farming at the time the property was taken. In that case, as in this, the party claiming the exemption had been engaged in farming as a tenant, but was not so engaged, and had not leased a farm, for that year. It was held, however, that he was a farmer, within the meaning of the statute, and the court below properly so held in this case. *Affirmed.*

BROADSTREET v. CLARK, Defendant and THE CHICAGO, MILWAUKEE & ST. PAUL R'Y COMPANY, Garnishee.

SUPREME COURT OF IOWA. 1885.

[Reported 65 Iowa, 670.]

THE defendant railroad company was garnished as the supposed debtor of its co-defendant. Judgment was rendered against both defendants, and they appeal.

SEEVERS, J. Upon being garnished, the railroad company answered that it was indebted to Clark, the judgment debtor, who was one of its employes in Dakota territory, and that he was a married man, and the head of a family, and a resident of said territory when the work and labor were performed for which the in-

debtedness was incurred, and that the same had been earned within ninety days prior to the garnishment; that under the laws of said territory said earnings were exempt from execution. Clark, the judgment debtor, intervened in the garnishment proceeding, and in substance pleaded the same facts as above stated, and asked that the garnishee be discharged. Upon motion of the plaintiff, judgment on the answer of the garnishee and petition of intervention was rendered for the plaintiff, and we are required to determine whether the court erred in the rendition of such judgment.

We regard it as the settled rule in this state that the exemption laws of another state or territory cannot be pleaded or relied on as a defense by either the garnishee or judgment debtor. *Newell v. Hayden*, 8 Iowa, 140; *Leiber v. Union Pac. R'y Co.*, 49 Iowa, 688; *Mooney v. Union Pac. R'y Co.*, 60 Iowa, 346. See, also, *Burlington & M. R. R'y Co. v. Thompson*, 31 Kan., 180, and authorities there cited.

*Affirmed.*<sup>1</sup>

### SHINN *v.* MACPHERSON *et Ux.*

SUPREME COURT OF CALIFORNIA. 1881.

[Reported 58 *California*, 596.]

Ross, J. The plaintiff and the defendant, John Macpherson, formed a copartnership June 2d, 1879, which continued to September 24th, 1880, when it was dissolved by mutual consent. During this time John Macpherson was the owner of a certain house and lot, where he resided with his wife, the defendant Esther Sutherland Macpherson, and on which he had previously, to wit, May 19th, 1877, executed to one Borel a mortgage to secure the payment to him of the sum of one thousand seven hundred dollars in gold coin. A few days previous to the dissolution of the partnership between Shinn and Macpherson, that is to say, on the 16th of September, 1880, Mrs. Macpherson filed a declaration of her intention to claim the house and lot as a homestead, and the next day — September 17th — John Macpherson secretly and surreptitiously drew from the assets of the firm of Macpherson & Shinn the sum of two thousand four hundred dollars (there being nothing at the time due him from the firm or from Shinn), out of

<sup>1</sup> But see *Drake v. Lake Shore & M. S. R. R. Co.*, 69 Mich. 168, 37 N. W. 70, 13 Am. St. Rep. 282. Compare *Mitchell v. Shook*, 72 Ill. 492; *Mumper v. Wilson*, 72 Ill. 163, 33 N. W. 449; *Chicago, B. & Q. R. Co. v. Moore*, 31 Neb. 629, 48 N. W. 475. See *Drake, Attachment*, 7th ed., 480b. — Ed.

which he, on the 27th day of September following, paid off and discharged the mortgage lien held by Borel on the premises. The money so drawn and disposed of by Macpherson was, at the time it was drawn and disposed of, and still is, due to creditors of Macpherson & Shinn. Macpherson having refused to restore or in any way to account for the said sum or any part of it, this action was brought by Shinn for an account, etc., and to obtain a decree adjudging a lien upon the house and lot, paramount to the homestead right, for the amount paid by Macpherson in discharge of the mortgage lien; and also adjudging that the premises be sold to satisfy such preferred lien, and that the proceeds of such sale be applied to the satisfaction of the debts due the creditors of the firm of Macpherson & Shinn.

There can be no doubt that equity and good conscience is on the side of the plaintiff. Here was a married man, dwelling with his wife upon premises on which there was an existing mortgage. The mortgage existing, the wife filed a declaration of homestead on the premises. In this condition of affairs the husband fraudulently abstracted funds from the assets of the firm of which he was a member, and which was indebted to third parties, and with those funds paid and discharged the mortgage lien, thus leaving the homestead clear, and the firm creditors as well as his partner defrauded. In our opinion there is no provision of the homestead law that affords a cloak for such a transaction. That law was enacted for beneficent purposes, designed to secure a home for the family, but, as said by counsel for respondent, was never intended "to be a secure and impregnable asylum in which to deposit peculations from others." It is true that the statute provides that the homestead can only be conveyed or incumbered by an instrument executed and acknowledged by both husband and wife; and also, that it is by the statute exempted from execution or forced sale except in certain enumerated cases. But these provisions of the statute have no application to the case before us. The one regulates the mode of transfer or incumbrance of the homestead between the spouses and third persons, when the same is to be effected by conventional arrangement — not by act and operation of law; the other was designed to protect it from forced sale for ordinary indebtedness, etc. — not as an immunity from torts and their legal consequences. *Shoemaker v. Chalfant*, 47 Cal. 435; *Riddell v. Shirley*, 5 id. 488; *Bishop v. Hubbard*, 23 id. 514.

It is not important that it does not appear that Mrs. Macpherson participated in the wrongful acts of her husband. If the



transaction is permitted to stand, she, as well as he, will reap the fruit of the fraud, whereas the interposition of equity does but restore a lien on the premises for the amount paid by the husband, in the manner already stated, in satisfaction of the mortgage lien. In this way justice is meted out to all parties without injury to any. Both husband and wife continue to hold their homestead right, subject, however, now, as before, to a lien for the payment of the amount with which the mortgage was discharged. Neither ever had, or ever could have, any right founded on the fraudulent appropriation of funds of other parties. The case of *Barber v. Babel*, 36 Cal. 11, relied on by appellant, is altogether unlike this.

*Judgment affirmed.*

McKINSTRY, J., THORNTON, J., MYRICK, J., and MORRISON, C. J., concurred.

BAILEY and TINKLER *v.* WRIGHT by her next friend.

SUPREME-COURT OF MICHIGAN. 1878.

[Reported 39 *Michigan*, 96.]

CAMPBELL, C. J. Defendant in error replevied a piano from plaintiffs in error, who defend on the ground that she purchased from one Ackley, and that the purchase was void as against a levy made by them upon an attachment against him.

Several questions are presented on the record, but inasmuch as the only defense was under the levy, the validity of that is the first matter to be considered.

The defendants by their own testimony showed that while Ackley was temporarily absent, and his house, where his wife was present at the time, was locked up, they broke into it by violence and seized the piano upon the writ.

It is admitted this was a trespass, but it is claimed the levy may be a good levy in spite of the wrongful acts by which it was accomplished.

We think this is too dangerous a doctrine to be tolerated. Public policy requires above all things that courts and officers executing their process shall respect the lawful rights of all persons. The practical permission which over-zealous officers would receive to commit wrongs with substantial impunity, if their levies should be held good without regard to the manner of their enforcement, would remove every check on lawlessness. To hold that an act is lawful which may be lawfully resisted is absurd. Such miscon-

duct should neither be justified nor winked at. Any officer who breaks the law should be held to be entirely without excuse, and as fully responsible as any other malefactor.

The doctrine on this subject is so fully discussed in *Ilseley v. Nichols*, 12 Pick., 270, and *People v. Hubbard*, 24 Wend., 369, that we need not go into any further investigation. The doctrine is sensible and just, and is the only one whereby private safety and public peace can be preserved. There can be no respect for courts and their process if their ministers are upheld in violations of law, or if they can be lawfully opposed in exercising their functions, as they may be if such levies are held valid.

As the defense entirely failed, it is not important what rulings were made on other points. Judgment must be affirmed with costs.<sup>1</sup>

### KIFF *v.* OLD COLONY & NEWPORT RAILWAY COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1875.

[Reported 117 *Massachusetts*, 591.]

TORT, with a count in contract, against the defendant as a common carrier, for a failure to deliver certain property described in the declaration as spirituous liquors, and alleged to be of the value of \$713.

At the trial in the Superior Court, before Bacon, J., the plaintiff offered evidence tending to show that the property was his, was shipped by him, and came into the possession of the defendant as a common carrier, and was so in its possession at Boston in due course of transportation to Belfast, Maine; that the defendant failed to deliver it to him at Boston on demand.

The defendant then offered evidence tending to show that on the day the goods were received by it at Boston, they were taken from its possession by Robert S. Carroll, a duly appointed and qualified constable of the city of Boston, without fraud or collusion on its part, against its will, and with no knowledge that they were spirituous liquors, on a legal and valid writ of attachment, having

<sup>1</sup> As to the right of the sheriff to enter upon the defendant's or a stranger's premises, see *Semayne's Case*, 5 Rep. 91a; 2 Freeman, Executions, 3d ed., sec. 256; 8 Encyc. of Pl. & Pr. 517.

As to the right to levy on property on the defendant's person see *Mack v. Parks*, 8 Gray (Mass.), 517; 2 Freeman, Executions, 3d ed., sec. 255. — Ed.

an *ad damnum* of three hundred dollars, against the plaintiff in the case at bar and in favor of William F. Nye.

The defendant then requested the judge to rule, that if the goods were taken from its possession on a legal and valid writ of attachment against the plaintiff, by a proper officer, without fraud or collusion on its part, against its will, and with no knowledge that they were spirituous liquors, it was not liable for a failure to deliver the goods to the plaintiff. The judge declined so to rule, and ruled that the goods were not liable to be taken on a writ of attachment against the owner; that the facts offered to be shown by the defendant constituted no defence to this action, and that the only question for the jury was the value of the property at the time the defendant failed to deliver it to the plaintiff, to which the defendant alleged exceptions.

The judge, after verdict, reported the case for the consideration of this court; if the rulings for the plaintiff were sustained, judgment to be entered on the verdict; if not, the verdict to be set aside.

GRAY, C. J. In *Ingalls v. Baker*, 13 Allen, 449, it was adjudged by this court, upon full consideration of the provisions of the General Statutes and of the previous legislation of the Commonwealth upon the subject now before us, that the Gen. Sts. c. 86, § 28, prohibiting the sale of intoxicating liquors, directly or indirectly, except as authorized in that chapter, and containing no exception of sales by officers under legal process, manifested the intention of the Legislature that intoxicating liquors should not be sold on execution, and therefore such liquors could not be lawfully attached on mesne process.

In 1868, the Legislature passed a new act to regulate the sale of intoxicating liquors, which provided that "nothing herein contained shall apply to sales made by sheriffs, deputy sheriffs, coroners, constables, collectors of taxes, executors, administrators, guardians, assignees in insolvency or bankruptcy, or any other person required by law to sell personal property"; and that "the eighty-sixth chapter of the General Statutes, and all acts and parts of acts inconsistent herewith, are hereby repealed." St. 1868, c. 141, §§ 1, 26.

But in 1869, the Legislature again revised the whole law upon the subject, reenacted the provision of the Gen. Sts. c. 86, § 28, and expressly repealed the previous statutes, including the St. of 1868, c. 141. St. 1869, c. 415, §§ 30, 65.

These statutes of 1868 and 1869 were passed after, and it must be presumed with full knowledge of, the decision in *Ingalls v. Baker*. The conclusion is inevitable that the Legislature, when they repealed the St. of 1868, c. 141, and reenacted the provision of the Gen. Sts. c. 86, § 28, intended that the exception introduced by the St. of 1868, and which had been held by this court not to exist under the General Statutes, should not exist for the future and that the law of the Commonwealth should be as declared in *Ingalls v. Baker*. *Low v. Blanchard*, 116 Mass. 272, 274.

It follows that the plaintiff's liquors were not liable to attachment, the attachment of them was illegal, and the officer who attached them a trespasser. *Bean v. Hubbard*, 4 Cush. 85. *Deyo v. Jennison*, 10 Allen, 410, 413.

Every common carrier of goods being in the nature of an insurer, liable — upon grounds of public policy, and to guard against the possibility of fraud and collusion on his part — for all losses, even by accident, trespass, theft, robbery, or any kind of unlawful taking, and excepting only those arising by act of God or of public enemies, it also follows that it was rightly ruled at the trial that the facts offered to be shown by the defendant corporation constituted no defence to this action against it as a common carrier. 2 Kent Com. (12th ed.) 597. *Coggs v. Bernard*, 2 Ld. Raym. 909, 918; S. C. 3 Salk. 11. *Edwards v. White Line Transit Co.* 104 Mass. 159. *Adams v. Scott*, Ib. 164, 166.

*Judgment on the verdict for the plaintiff.*<sup>1</sup>

## RISDON IRON AND LOCOMOTIVE WORKS v. CITIZENS' TRACTION COMPANY OF SAN DIEGO.

SUPREME COURT OF CALIFORNIA. 1898.

[Reported 122 *California*, 94.]

BRITT, C. Respondent is a street railroad corporation organized under the laws of this state, and on January 9, 1897, in virtue of certain franchises to it granted by the city of San Diego, it was engaged in operating a line of street railway in said city for the transportation of passengers, electricity being used as the motive power. This is an action by appellant, which is also a corporation, on a promissory note of respondent; on the day aforesaid appellant caused a writ of attachment, issued in the

<sup>1</sup> *Barron v. Arnold*, 16 R. I. 22, 11 Atl. 298, *accord*. *Howe v. Stewart*, 40 Vt. 145, *contra*. — ED.



action, to be levied on certain cars, trucks, electric goods and supplies, fire-proof safes, *et cetera*, the property of respondent, then used and necessary to be used in and about the business of operating said line of street railway. Thereupon respondent moved the court to discharge the attachment on the ground (we state it generally) that, considering the nature of respondent's business as a carrier of passengers, and the uses of the attached property in that behalf, the same was not subject to attachment for respondent's debt. The court ordered that "said attachment be discharged in respect of said property." Plaintiff appealed from the order. . . .

As to the merits of the order, in our opinion the quality of the exemption from execution which pertains, except when otherwise provided by statute, to the franchise of a corporation such as the respondent (*Gregory v. Blanchard*, 98 Cal. 311), does not extend also to property of the kind attached in this action, although it may be proper or even necessary to operations under the franchise. Such property does not emanate mediately or immediately from the state like the privileges embraced in a franchise; it has no character of personal trust as in the case of the franchise, and in our opinion it is subject to attachment or execution in like manner as other property not exempt by statute. Code Civ. Proc., sec. 540, 688, 690; *Lathrop v. Middleton*, 23 Cal. 257; *Humphreys v. Hopkins*, 81 Cal. 551, 15 Am. St. Rep. 76; 1 Freeman on Executions, sec. 146a; *Coe v. Railroad Co.*, 10 Ohio St. 372, 75 Am. Dec. 518; *State v. Rives*, 5 Ired. 297, 307. There are respectable authorities which hold a different doctrine, but we are disposed to think they are not supported by the better reason. See *Hart v. Burnett*, 15 Cal. 593. Whether the rule of liability to attachment or execution should extend to sections of railway lines, or to parts of other similar aggregations of property susceptible of use only as a unit, need not be decided. The cars, trucks, iron safes, and other movables seized under the writ in this action are not such property. The order appealed from should be reversed.

CHIPMAN, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is reversed.<sup>1</sup>

McFARLAND, J., TEMPLE, J., HENSHAW, J.

<sup>1</sup> But compare *Northern Pac. Ry. Co. v. Shimmell*, 6 Mont. 161, 9 Pac. 889.

By statute in many jurisdictions the franchise of a public service corporation is subject to levy. See *Simmons v. Worthington*, 170 Mass. 203, 49 N. E. 114; *Philadelphia, etc., R. R. Co.'s Appeal*, 70 Pa. 355. — Ed.

## SHELDON v. ROOT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1835.

[Reported 16 *Pickering*, 567.]

TRESPASS to recover the value of thirty-five dollars in silver coin, which was taken from the possession of the plaintiff by the defendant, who was a deputy sheriff, on November 7, 1831. The defendant pleaded the general issue, and filed a brief statement, which alleged, that he attached the coin in question as the property of one John Harmon, upon a writ issued in favor of Asenath Hamilton, that on June 2, 1832, an execution was issued upon the judgment recovered in that action, that the property attached was applied towards the payment thereof, and that this was the trespass complained of in the declaration.

At the trial in the Court of Common Pleas, before Strong J., it appeared, that the coin was received by the plaintiff in part payment of a debt due to Harmon, which debt was assigned by Harmon to the plaintiff on July 13, 1830, with a power of attorney authorizing him to collect it for his own use.

It did not appear by the return of the execution, that the coin had been taken by virtue thereof, or that it had been advertised for sale, or that it had been sold, under such execution.

The defendant contended, that the assignment was made by Harmon for the purpose of defrauding his creditors; and this question was submitted to the jury.

The plaintiff read in evidence the deposition of N. Roplee, which was taken under a commission. The second interrogatory to the deponent was as follows: "What was the situation of said John Harmon, on the 13th day of July, 1830, as to property?" In answer to this interrogatory, the deponent testified, "that the said John Harmon was considered, on the 13th of July, 1830, in good circumstances, as to property." The defendant objected to the admission of this answer in evidence. The plaintiff contended, that the objection should have been made to the interrogatory before the commission was issued. The judge decided, that the interrogatory was well enough, but that the answer was not an answer to the interrogatory; and it was rejected.

The judge, in order to obtain the opinion of the jury upon the other evidence, instructed them, that the silver coin was attachable; but that if it was not, the plaintiff could not take the objection.

The jury returned a verdict for the defendant. The plaintiff excepted.

WILDE, J., delivered the opinion of the Court. Whatever doubts may have been entertained formerly on the question, whether money be attachable and can be taken on execution or not, they are, we think, entirely removed by the case of *Turner v. Fendall*, 1 Cranch, 117.

There seems to be no good reason why money should not be attached and taken on execution as well as other property. The quaint reasons given in some of the old cases, viz. that money cannot be identified, and cannot be sold, seems to have very little weight; for money may be identified as well as other property, though not always with equal facility. Then as to the sale of money, that to be sure would be an absurdity, and for that reason the St. 1783, c. 57, § 5, which directs the sale of goods or chattels taken on execution, is not applicable to money; but this by no means shows, that money cannot be taken on execution. On the contrary, the sheriff is expressly directed by the form of the execution as prescribed by law, to cause the execution to be paid and satisfied out of the *money*, goods or chattels of the debtor. This is decisive as to the question, whether money may be taken on execution. And if money is liable to be taken on execution, we think it equally clear that it is liable to attachment. The object of an attachment is, to secure such property of the debtor as may be liable to be taken on execution. The officer is commanded to attach the goods and estate of the debtor, which certainly includes money. A bequest of a man's goods and estate would undoubtedly pass money; and the command of the writ, therefore, authorized the attachment.

But it is objected, that the money attached was not the property of Harmon, and this objection would be well founded, if it had appeared, that the plaintiff was an officer or an agent or attorney lawfully authorized to collect the money. But he obtained the money by means of a fraudulent assignment, and as against the creditors of Harmon he had no right or property, and therefore cannot maintain this action. By the payment to the plaintiff the debt to Harmon was discharged, and the money became his property, for it could not become the property of the plaintiff, by reason of the fraud.

In regard to the deposition, we think it was rightfully rejected. The answer of the deponent was hearsay evidence, as to the circumstances of Harmon, stating what they were reputed to be, and

not what he knew them to be. It was contended that the objection should have been made to the interrogatory before the commission issued. But the interrogatory was unexceptionable. The witness was asked, what were the circumstances of Harmon, and not what they were reputed to be.

*Judgment of the Court of Common Pleas affirmed.*<sup>1</sup>

WILDER v. BAILEY AND DARLING, his Trustee.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1807.

[Reported 3 *Massachusetts*, 289.]

THE question in this action arose from the answer of the trustee, and from an agreement on record, from both which it appeared that Darling was a deputy sheriff, and had collected a sum of money on an execution issued upon a judgment, in which Bailey, the principal defendant, was the creditor, and Caleb Wilder was the debtor. Darling held this money at the time of the service of this process upon him, the said execution being returnable at a period posterior to the said service. The question for the determination of the Court was, whether Darling, upon these facts, was liable to a foreign attachment as the trustee of Bailey, in virtue of his holding the said sum of money; and it was submitted to the Court, without argument, at the last October term in this county. The cause was continued for advisement; and now, at this term, the Court delivered their opinion as follows:<sup>2</sup> —

PARKER, J. Actions similar to this are frequently instituted at the instigation of judgment debtors for the purposes of revenge or delay; and there has been a prevailing opinion at the bar that such actions may be supported. This opinion arose from the very general and comprehensive words of the statute, by which all the goods, effects and credits of the debtor are made subject to this species of attachment, in whose hands or possession soever they may be found. Notwithstanding these expressions, it was decided that an aggregate corporation is not liable to this process, because they are not capable of disclosing upon oath.

<sup>1</sup> *Turner v. Fendall*, 1 Cranch (U. S.), 117, 2 L. ed. 53; *Handy v. Dobbin*, 12 Johns. (N. Y.), 220, *accord*. Compare *Clarke v. Larremore*, 188 U. S. 486, 47 L. ed. 555, 23 S. Ct. 363. — ED.

<sup>2</sup> The concurring opinions of Sedgwick, J., and Parsons, C. J., are omitted. — ED.



I am very glad that the question in this case is presented to us in so simple a form, that it may be put at rest, and a check given to a practice, from which much mischief has unquestionably arisen.

When an officer receives money upon an execution, the law prescribes his duty in relation to it. He is not bound to pay it over to the creditor until the return day of the execution. From his receipt of it until that day, it is not the creditor's money, but is in the custody of the law; and in some respects it is still under the control of the law. I am decidedly of opinion that the trustee in this case cannot be held.

SEWALL, J. I consider the statute giving this process of foreign attachment as a very beneficial one, and am therefore for applying a liberal construction to it. But there must be bounds to this liberality. In the case before us, an officer, in execution of a precept of the law, has received money, for which he is accountable to a third person. An attempt is made to interrupt the execution of the precept, and to divert the money from the course which the law has prescribed. If such practice should be permitted, great inconvenience and mischief would be the consequence. The money was in the custody of the law, and in my opinion was not liable to be arrested in the hands of the officer.

*Trustee discharged.*<sup>1</sup>

BROWER, Sheriff &c., v. SMITH and another.

SUPREME COURT OF WISCONSIN. 1863.

[Reported 17 *Wisconsin*, 410.]

*By the Court*, PAINE, J. The Dodge County Bank made an assignment to Lewis & Schuyler, and delivered to them, among other things, its books of account. Kellogg & Larke sued the bank, and summoned Lewis & Schuyler as garnishees. They recovered judgment against the bank, and it was also adjudged, as against the garnishees, that the assignment to them was void, and that the property they held was the property of the bank and they were ordered to deliver it over to the sheriff, which they did. The defendants in this suit were indebted to the bank, as

<sup>1</sup> Compare *Thompson v. Brown*, 17 Pick. (Mass.), 462, and *Prentiss v. Bliss*, 4 Vt. 513, in which, under similar facts, an attachment was disallowed. But see *Wehle v. Conner*, 83 N. Y. 231, *contra*. See *Drake, Attachment*, 7th ed., *secs.* 251, 506. — Ed.

appeared by its books of account, and this action is brought by the sheriff to recover that debt.

Subdivision 4 of section 54, chap. 130, R. S., concerning attachments, provides that until the judgment is paid, "the sheriff may proceed to collect the notes and accounts and other evidences of debt that may have been seized or attached by virtue of the attachment, or that may have been delivered up by any person summoned as garnishee," &c. And the question is, whether the account against these defendants has been so attached as to enable the sheriff to maintain this action.

The respondent contends that this result follows from the mere fact that he has obtained possession of the books of account of the bank, and that the possession of those gives the same right to maintain suits for the accounts appearing in them, as would the seizure of a promissory note due the bank, to maintain a suit on that. This conclusion is based upon the claim that books of account are evidences of debt, and that our statute defines property as including evidences of debt. But we are of the opinion that books of account are not such evidences of debt, that the mere obtaining possession of them by an attaching officer constitutes any attachment of the debts mentioned in them. Those evidences of debt which may be attached by mere seizure, are only those which are complete and perfect evidences in themselves. But account books are not such. They are not evidence at all until certain facts are established in respect to them by the oath of the party keeping them, or of the person who made the entries; and in no case are they evidence of the payment of money beyond the amount of five dollars in one item. R. S., chap. 137, secs. 88, 89. We are of the opinion, therefore, that the mere obtaining possession of these books, did not vest in the sheriff any right to bring this suit.

The respondent relies on the language already quoted from sec. 54, to the effect that the sheriff shall "proceed to collect the notes and accounts, &c., which may have been seized and attached, or may have been delivered up by any garnishee." But certainly it could never have been designed to give any greater effect to the possession of the account books when obtained from a person who happened to have them in his possession as garnishee, than would have been given if the sheriff had taken them from the custody of the attachment debtor himself. The phrase "that may have been delivered up by any person summoned as garnishee," must be construed as applicable only to those kinds of property of which

possession alone would establish the right, as notes and other instruments, in accordance with the maxim, *reddendo singula singulis*.

Our conclusion seems to be placed beyond any doubt by the provisions of section 13, which point out specifically how "a debt or other property incapable of manual delivery to the sheriff," may be attached, which in the case of a debt is, by leaving a certified copy of the attachment with the debtor, with a notice showing the property levied on. Now, if any other creditors of the bank, after the sheriff got possession of the account books, had attached the debt due from these defendants, by complying with this section, it is evident their attachment would have held it, as against this action, if priority is to be allowed at all among creditors of such a corporation. It would be clearly so, if the attachment debtor was an individual. And yet it would be so only because the prior possession of the account books of the debtor did not constitute any attachment of the debts appearing in them.

For these reasons, we think the debt due from these defendants, has not been attached, as there is no pretense that section 13 was complied with; and consequently that this action cannot be sustained.

The judgment is reversed, with costs, and the cause remanded for a new trial.<sup>1</sup>

O. L. PACKARD MACHINERY COMPANY *v.* LAEV,  
Garnishee.

SUPREME COURT OF WISCONSIN. 1898.

[Reported 100 *Wisconsin*, 644.]

WINSLOW, J.<sup>2</sup> . . . The objection that corporate stock cannot be reached by garnishing the person in possession of the certificates seems also fatal to the plaintiff's case. Garnishment simply reaches property, moneys, credits, and effects of the defendant in the possession or control of the garnishee, and debts due or to become due. R. S. 1878, sec. 2768. Corporate stock is property,

<sup>1</sup> *Rosenthal v. Circuit Judge*, 98 Mich. 208, 57 N. W. 112, *accord*.

As to whether a judgment may be reached by creditors, see *Coppel v. Smith*, 4 T. R. 312; *Franklin v. Ward*, 3 Mason (U. S.), 136; *Howell v. Freeman*, 3 Mass. 121; *Shinn v. Zimmerman*, 3 Zab. (N. J.), 150; *Norton v. Winter*, 1 Ore. 47; 1 *Freeman, Executions*, 3d ed., sec. 112. — Ed.

<sup>2</sup> Only a part of the opinion of the court is given. — Ed.

but the certificate of such stock is not the stock. It is much like a title deed or a bill of sale, which is not the property itself, but simply the evidence of title to property. Our statute provides a plain and certain way by which corporate stock may be attached or seized upon execution and sold. R. S. 1878, secs. 2738, 2989, 2990. The sheriff is required to leave a copy of the writ with the clerk, treasurer, or cashier of the corporation, and obtain from him a certificate of the number of shares of the corporate stock owned by the debtor, and may thereafter sell such shares, and give a certificate of title to the purchaser. This course was open to the plaintiff, and he should have pursued it. In no other way could he obtain satisfaction out of the stock. Rood, Garnishment, § 108; Moor v. Walker, 46 Iowa, 164; Younk v. Collier, 47 Fed. Rep. 571.

*By the Court.* — Judgment reversed, and action remanded with directions to dismiss the garnishment proceedings.<sup>1</sup>

### SHAW v. AVELINE.

SUPREME COURT OF INDIANA. 1854.

[Reported 5 *Indiana*, 380.]

STUART, J.<sup>2</sup> Shaw filed his bill in chancery against Aveline, alleging a judgment at law, execution, and return of *nulla bona*. It was further alleged that Aveline had a judgment at law in the same Court against a Miami Indian. The prayer of the bill, among other things, is, that Aveline be compelled to assign his judgment to Shaw, and that Aveline's judgment-debtor, the Indian, who is also made a party to the bill, be required to pay the amount of that judgment to Shaw, to be applied on the judgment against Aveline.

In brief, it is a bill in equity by a judgment-creditor seeking to subject a chose in action.

At the March term of 1851, the defendants moved to dismiss the bill for want of equity; and the Court sustained the motion. Shaw prosecutes error.

There is no appearance and no brief in behalf of Aveline. . . .

From all these authorities, it is clear that the jurisdiction to subject choses in action does not exist at common law. At one

<sup>1</sup> See 1 Freeman, Executions, 3d ed., sec. 112a. — ED.

<sup>2</sup> A part of the opinion is omitted. — ED.



time it was held in England, that equity had such power; but it was denied and wholly overthrown in the times of Thurlow and Eldon. Such is also the prevailing American doctrine. Many of the states have, therefore, interposed by statute, giving various degrees of relief under what is sometimes denominated a creditor's bill. In Ohio and Kentucky, the jurisdiction of Courts of chancery over choses in action is denied, save only to the extent to which such jurisdiction has been conferred by statute. *Gilmore v. The Miami Bank et al.*, 3 Ohio 502. — *Douglass v. Huston*, 6 Ohio 156. — *Cadwallader v. The Granville Alexandrian Society*, 11 Ohio 292. — *Buford v. Buford*, 1 Bibb 305. — *McFerrin v. Jones*, 2 Litt. 219. — *Cosby v. Ross*, 3 J. J. Marsh. 290. — *Crozier v. Young*, 3 Mon. 158. — *Estill v. Rodes*, 1 B. Mon. 314. — *Moore v. Young*, 1 Dana 516. — *Doyle v. Sleeper*, id. 534. In this latter case, the Court say, that the weight of authority is opposed to the doctrine advanced in *Bayard v. Hoffman*, *supra*; and add, that the legislature of Kentucky virtually admitted the common law as denying the jurisdiction, when in 1821 the act was passed authorizing Courts of equity to subject choses in action. So, also, in New Jersey. *Fuller v. Taylor*, 2 Halst. Chy. 301.

In Michigan, the chancery powers of the Courts to subject choses in action, are conferred by statute; and the complainant is held to great strictness in bringing himself within the statutory requirements. *Smith v. Thompson*, Walk. Ch. 1. — *Williams v. Hubbard*, id. 28. — *Beach v. White*, id. 495. Accordingly the case of *Lorman v. Clarke*, 2 McLean 568, referred to in argument, is a decision under the statute of Michigan, which is quoted in the opinion. What is added about the general principles of equity, is a deserved eulogium on the legislature, which enables the Courts to frustrate fraud. But even the opinion of so eminent a judge as to what the law should be, cannot be regarded with the authority of an adjudicated case, to settle what the law is. If the case of *Van Ness v. Hyatt*, 13 Peters 294, goes the length claimed for it by judge McLean, it stands alone against the whole current of recent authorities both in England and the United States.

Whenever the power is deemed desirable, it is better that the legislature confer it, than that the Courts should assume it. It is said in *Lorman v. Clarke*, *supra*, to be a reproach to our jurisprudence, that the debtor should be able to secrete his property from execution. But if a reproach, it seems rather to be so to the legislative than the judicial department. With so many authorities staring them in the face, the assumption of such power by the

Courts would be strongly questioned. Nor could the Courts easily give form to the remedy, or create limitations to guard their usurpation from abuse. But if conferred by the legislature, the extent of the jurisdiction could be carefully guarded, enlarging or limiting it as experience might suggest. Whether, for instance, it should embrace only choses in action arising *ex contractu*, or should be made to cover every cause of action a debtor might have, whether arising from contract or tort, would present considerations of policy more properly legislative than judicial.

*Per Curiam.* — The decree is affirmed with costs.<sup>1</sup>

BARCLAY v. SMITH.

SUPREME COURT OF ILLINOIS. 1883.

[Reported 107 *Illinois*, 349.]

CRAIG, J. There is but one question presented by this record, and that is, whether a certificate of membership in the board of trade of the city of Chicago, is property, which is liable to be subjected to the payment of the debts of the holder by legal proceedings.

The Board of Trade of Chicago is a corporation created by a special act of the legislature of the State, with power to sue and be sued, to purchase and hold property not to exceed at any time \$200,000. The objects of the corporation, as declared by the charter and by-laws, are "to maintain a commercial exchange; to promote uniformity in the customs and usages of merchants; to inculcate principles of justice and equity in trade; to facilitate the speedy adjustment of business disputes; to acquire and to disseminate valuable commercial and economic information; and generally, to secure to its members the benefits of coöperation in the furtherance of their legitimate pursuits." By the 12th section of the charter the corporation is prohibited from transacting any business excepting such as is usual in the management of boards of trade or chambers of commerce. No dividends whatever are made among

<sup>1</sup> See *Greene v. Keene*, 14 R. I. 388. But see *Burton v. Farinholt*, 86 N. C. 260. See also Ames, *Cases on Trusts*, ed. of 1905, 444; 6 Pomeroy, *Equity Jurisprudence*, 3d ed., Chap. XLV.

For the present English law as to reaching the judgment debtor's choses in action, see Rules of the Supreme Court, 1883, Order XLV (*Annual Practice*, 1915, pp. 802 *et seq.*); Odgers, *Pleading*, 7th ed., Chap. XXII; Williams, *Personal Property*, 17th ed., 250. — ED.

the members of the corporation. No person can become a member unless he receives the votes of not less than ten of the board of directors. A certificate of membership is transferable on the books of the association to any person eligible to membership who may be approved by the board of directors, after due notice. The corporation has power to make by-laws for the management of its business, and the mode in which it shall be transacted. Under the by-laws the board of directors are required to provide necessary rooms and offices for the purposes of the association, which shall be kept open on all business days during certain hours, for the admission of the members.

From an examination of the charter and by-laws of the corporation it is apparent that no member receives any pecuniary profit from the corporation, or from its capital or revenue, except such advantage in the way of trade that he may derive from the mere privilege of being a member, and from being admitted to transact business in the rooms of the board. If dividends were authorized to be declared among the members, as stockholders, of the earnings or accumulations of money or property, there might be some ground for holding that a certificate of membership was property, and liable to be taken for the debts of the member; but such is not the case. However much money or property may be accumulated by the board, it is powerless to declare a dividend among its members.

When the nature and object of a certificate of membership are understood, can it, upon any reasonable principle, be said to be property? In Bouvier's Law Dictionary, the author, under the head of "Property," gives a definition, as follows: "The right and interest which a man has in lands and chattels to the exclusion of others." The author also announces the rule that property, considered as an exclusive right to things, contains not only the right to use those things, but a right to dispose of them as the owner may desire. The certificate of membership is neither lands nor chattels, nor can a member dispose of his membership as he pleases. A sale can only be made to such person as the board, through its directors, may determine. If, then, a certificate of membership is property, it does not fall within the definition given, nor do we know of any definition of property within which it would fall.

It may be said that a certificate of membership has a large value, and hence ought to be regarded as property. It is true that the board requires a person who becomes a member to pay an initiation fee of \$5000, and the evidence shows that a certificate of member-



ship is regarded in the market as worth \$4000; but this does not change the character of the right. A church organized under our statute may own property, for the uses and privileges of its members, worth as much as the property possessed by the board of trade, and the right of a member to attend the meetings of the church and occupy a pew may be regarded as a high and valuable right and yet the right of membership has never been regarded as property which may be subjected to the payment of the debts of a member. The same may also be said in regard to the membership in a masonic lodge, or a social club, and various other organizations of a similar character.

There may be, and doubtless are, many privileges which a man may possess that are valuable to him, which do not fall within the definition of property, and which may be enjoyed, but cannot be subjected to the payment of debts. A liquor dealer may be licensed to sell liquors at a certain place, for a certain time, for which privilege he is required to pay \$1000 per annum. That privilege is worth to him much more than he is required to pay; but is that privilege property which may be sold on execution, or reached by a creditor's bill, for the payment of debts? We have never so understood the law. A peddler or an auctioneer may be licensed to carry on his vocation within a certain district, for which he may pay a stipulated sum of money. The profits arising from the privilege of exercising the right may be much larger than can be earned by a person exercising the right to transact business on the floor of the board of trade, and yet we have never understood that such a privilege was liable to be seized and sold in satisfaction of debts. The attorney and the physician are licensed to practice their professions. It costs money to obtain such a privilege. It may be, and is, a valuable right, and yet such a right cannot be taken by a creditor's bill and sold in satisfaction of a debt. The same may be said in regard to various other privileges which may be, and often are, conferred upon persons in the different pursuits of life.

A certificate of membership in the Board of Trade of Chicago empowers the person who is admitted as a member to attend the meetings of the board, and deal in the various products of the country. This right to appear at a certain place and transact certain business, in our judgment is not property, but it is a mere privilege conferred upon the member, which cannot be reached and sold by the process of courts. It is a right which may be regarded as valuable, but which cannot be divested or destroyed, except by



the board itself, for a failure of the member to conform to the rules and regulations of the association. This view is in harmony with the rule announced by the Supreme Court of the State of Pennsylvania, where a similar question arose. *Thompson v. Adams*, 93 Pa. St. 55; *Pancoast v. Gowen*, id. 66.

We have been referred to some cases which seem to hold a different view, but without entering upon a review of the cases cited we do not think they establish the correct rule, and we are not inclined to follow them.

The judgment of the Appellate Court will be reversed, and the cause remanded.

*Judgment reversed.*<sup>1</sup>

LEGGETT, As Assignee, Etc., v. WALLER.

SUPREME COURT OF NEW YORK, SPECIAL TERM. 1902.

[Reported 39 *Miscellaneous Reports*, 408.]

FITZGERALD, J. This is an application by a judgment creditor for the appointment of a receiver of the property of his judgment debtor as disclosed by the examination of the latter in supplementary proceedings. The property in question consists of a seat in the Consolidated Exchange, of the estimated value of \$2000, but against which the debtor testifies there are debts, for money loaned, now outstanding. The application is opposed upon the three grounds: that the examination discloses no property to which the receivership could attach; that the seat and its attendant privileges constitute the defendant's necessary working tools and, as such, are exempt from judgment creditors, and finally, that the cases in which such applications have been granted concerned only the New York Stock Exchange, the rules of which are different from those of the Consolidated Exchange. So far as the judgment creditor's right to the receivership is concerned the first objection is of no force. The examination does disclose that the debtor owns a seat in the Consolidated Exchange of the estimated value of \$2000. It is true that the examination states that against this seat there are claims of other members; and these claims, under the rules of the association, have preference over and are to be paid before all other claims. The debtor does not show, however, the nature or extent of these claims or disclose the probability that

<sup>1</sup> A petition for rehearing was denied. The opinion of Craig, J., and the dissenting opinion of Mulkey, J., on the petition, are omitted. — Ed.

the amount thereof is sufficient to exhaust the fund that might be created by a disposition of the seat; and it may be that he has a substantial equity therein, to which the receiver would be entitled. Where there are conflicting claims against the debtor's property, the court cannot try and determine them, but should appoint a receiver (*Teller v. Randall*, 40 Barb. 242; *Corning v. Tooker*, 5 How. Pr. 16), who will receive such title to the property as was in the judgment debtor and subject to the conditions and restrictions by which it was surrounded in the latter's hands. The alleged existence of the other indefinite claims should not prevent the receivership, though it may subsequently cause that receivership to be of no practical benefit, so far as a realization of assets is concerned. The second objection is made upon the authority of *Keiher v. Shipherd*, 4 Civ. Pro. 274, where it was held that the share in the New York Law Institute of the value of \$150, held by the judgment debtor, a lawyer in active practice, and the privilege it confers, constituted his necessary working tools and library as a member of the legal profession, and as such was exempt from judgment creditors. That case is not identical with the one now before the court, for, though the constitution of the law institute and the nature and extent of the privilege of membership therein were not in that case and are not now fully set forth before the court, for the purpose of comparison, it may be said that the share and its attendant privileges are commonly supposed to consist of the right to make use of the books and facilities supplied by the institute. These books and similar facilities constitute the working tools of the lawyer. It is financially and physically impossible for the ordinary practitioner to own and keep all or most of the books in which the law is recorded or expounded, but he may obtain access to and the use of them by securing membership in an association which does possess them, and when he does, that membership constitutes, in law, his books or library or working tools. Such is the full extent and significance of the decision referred to, as is evident from the authority upon which it is based, viz., *Robinson's case*, 3 Abb. Pr. 466, where it is held that the professional books necessary to a professional man who supports his family, for the practice of his profession, are exempt from execution as a part of his family library. The membership in such an institute, with its privileges as above stated and as commonly understood, is essentially different, in legal nature, from the valuable right, license or franchise to transact business, in a special board or exchange, with a limited membership, and with peculiar rights and suitable facilities for the

conduct of such business. Again, even assuming that the seat in question constituted the judgment debtor's working tools, it would, under section 1391 of the Code, be exempt only to a sum not exceeding \$250 (*Faxon v. Mason*, 76 Hun, 408); whereas the debtor's own testimony shows it to be now worth about \$2,000. The third objection of the debtor seems to concede that so far as seats in the New York Stock and Cotton Exchanges are concerned, they are subject to the claims of outside, including judgment, creditors, and receiverships thereof may be ordered; but it further asserts that by reason of the different rules of the Consolidated Exchange, a seat in the latter is not subject to such claims or receivership. The differences between the rules of the said exchanges, and consequently the differences between seats or memberships therein and the effect of these differences upon the merits of this application, are not presented to the court. It has been held that a membership in the New York Cotton Exchange is property which passes to a receiver, who may maintain an action to compel the debtor to convey his seat to the member or to a member-elect with whom the receiver may negotiate for its sale. *Ritterband v. Baggett*, 4 Abb. N. C. 67; *Powell v. Waldron*, 89 N. Y. 328. The Court of Appeals, in *People ex rel. Lemmon v. Feitner*, 167 N. Y. 1, indicates, at page 6, a difference between the rules and regulations of the Stock Exchange and those of the Cotton Exchange. But an examination of these portions of the judicial authorities which quote the provisions of the constitution and by-laws of the Stock Exchange indicates that, so far as the nature of the membership and the merits of this application are concerned, they are very similar to and in many respects identical with those of the Consolidated Exchange, which are here referred to in opposition to this motion. And a membership in the former exchange has frequently been judicially declared to be property which passes to assignees in bankruptcy, is subject to the claim of creditors, and of which a receiver may be appointed. *Matter of Ketchum*, 1 Fed. Repr. 840; *Hyde v. Woods*, 4 Otto (U. S.) 523, referring to membership in the San Francisco Stock and Exchange Board; *Grocers' Bank v. Murphy*, 60 How. Pr. 426; *Belton v. Hatch*, 109 N. Y. 593; *People ex rel. Lemmon v. Feitner*, 167 N. Y. 1, 7. As a final answer to the last objection of the judgment debtor, we have in the case of *Roome v. Swan*, 15 Civ. Pro. 344, an instance not only of the appointment of a receiver of a seat or membership in the very exchange of which the judgment debtor herein is a member, viz., the Consolidated Stock and Petroleum Exchange of New York, but



also a statement of the subsequent procedure to make that receivership effectual. For the above reasons, the motion for the appointment of a receiver should be and is hereby granted. As the right, title and interest of the receiver is probably subordinate to the rights of the creditors of the judgment debtor who are his fellow members in the exchange, and as the receiver's jurisdiction over the seat or membership must be subject to and exercised in accordance with the rules and regulations of that exchange, the order to be presented should incorporate the practice suggested in *Grocers' Bank v. Murphy*, 60 How. Pr. 426, and *Roome v. Swan*, 15 Civ. Pro. 344. Settle order on notice. *Ordered accordingly.*<sup>1</sup>

## EIKENBERRY &amp; CO. v. EDWARDS.

SUPREME COURT OF IOWA. 1885.

[Reported 67 *Iowa*, 619.]

SEEVERS, J. The plaintiffs recovered a judgment against the defendant, and caused an execution to be issued thereon, which was returned unsatisfied. Thereupon the plaintiffs filed a petition, in which it was stated that the defendant had in his possession property which he unjustly refused to apply in satisfaction of the execution; and an order for the appearance and examination of the debtor, as provided in Code, § 3135, was asked. Such an order was made, and the defendant appeared in response thereto. An examination was had, and the fact disclosed that the defendant had sold certain real estate, and received therefor promissory notes amounting to \$18,760, which, the day after the notice was served requiring him to appear for examination, he had sent to his son-in-law in Colorado. The district court of Monroe county, in which the proceeding was pending, made an order requiring the defendant to turn over the notes to the court, and a receiver was appointed to receive and take charge of said notes, and it was further ordered that they should be regarded as assets subject to be sold on exe-

<sup>1</sup> *Habenicht v. Lissak*, 78 Cal. 351, 20 Pac. 874, *accord*.

A seat in a stock exchange passes to the member's trustee in bankruptcy. *Page v. Edmunds*, 187 U. S. 596, 47 L. ed. 318, 23 S. Ct. 200.

A patent right is subject to equitable execution. *Ager v. Murray*, 105 U. S. 126, 26 L. ed. 942.

A perpetual scholarship in a college has been held not to be subject to equitable execution. *Bank v. Morrow*, 99 Tenn. 527, 42 S. W. 200. — Ed.



cution. It was further ordered that, upon the notes being so turned over, they should be subject to any further order that might be made in vacation in relation thereto. The defendant failed to deliver the notes as required by the order, and afterwards he was, in vacation, adjudged by the judge of said court to be guilty of a contempt, and ordered to be committed to the jail of Wapello county until he obeyed the order of the court.

I. Counsel for the defendant insist that the defendant was not guilty of a contempt. The proceedings in question were commenced under chapter 3, title 18, of the Code, entitled "Proceedings Auxiliary to Execution," and section 3145 of that chapter provides that "if any person, party or witness disobey an order of the court or judge or referee, duly served, such person, party or witness may be punished as for contempt." The defendant certainly refused to obey the order of a court or judge. He therefore is clearly guilty of a contempt, unless the facts adduced on the examination will not warrant the order made, or the statute is unconstitutional. We have examined the record with care, and are of the opinion that, although the notes were in the actual possession of another, yet they undoubtedly were so held for the use and benefit of the defendant, and were under his control. The order, therefore, was fully warranted.

II. Is the statute unconstitutional? Counsel for the defendant cite and reply on *Ex parte Grace*, 12 Iowa, 208. It was held in that case that a similar statute was unconstitutional, because it conflicted with sections 9 and 10 of article 1 of the constitution, which provide that the right of trial by jury shall remain inviolate, and that no person shall be deprived of life, liberty or property without due process of law. The only case cited by counsel in support of their position is *Ex parte Grace*. It will therefore be assumed that no adjudged case can be found which accords therewith, and yet it is true that similar statutes have been in force in several of the states for some years. Possibly the first state to enact such a statute was New York, and we are not advised that it has been declared unconstitutional, although questions under it have frequently been determined in the inferior courts of that state. *In re Pester*, 2 Code Rep., 98; *Sandford v. Carr*, 2 Abb. Pr., 462; *Driggs v. Williams*, 15 Id., 477; *Kearney's Case*, 13 Id., 459; *Tompkins Co. Bank v. Trapp*, 21 How. Pr., 17; *Gould v. Torrance*, 19 Id., 560. Statutes substantially the same as ours have been held to be constitutional in *State v. Becht*, 23 Minn., 411, and *In re Burrows*, 33 Kan., 675; S. C. 7 Pac. Rep., 149.

Under the chancery practice as it existed at the time the constitution was adopted, a person could be deprived of his liberty or property, and such deprivation has always been regarded as having been accomplished by "due process of law," which has been defined to be "law in its regular course of administration through courts of justice." *Happy v. Mosher*, 48 N. Y., 313; *Mason v. Messenger*, 17 Iowa, 261; Den., *ex dem.*, *Murray v. Hoboken Land etc. Co.*, 18 How., 272. In so far as the pleadings are concerned, the distinction between actions at law and proceedings in chancery have been abolished by the Code, and there is now but one form of action, which pertains to both law and chancery. Under the chancery practice as it existed when the constitution was adopted, and now under the Code, a creditor's bill could be filed, the object of which was the discovery and subjection of property to the payment of a debt or judgment. Proceedings auxiliary to execution, as provided in the statute, were unknown to the common law; and the object to be accomplished thereby, and the manner of doing it, are or may be quite similar to a creditor's bill, and may be well regarded as affording an additional remedy for the accomplishment of the same object. At least it may be said to be a statutory proceeding not in accord with the common law, but more nearly like a proceeding in chancery, and should, under the Code, be classed as a special proceeding, and tried as an ordinary action at law or proceeding in chancery, and the mode of trial will be determined by assigning the proceeding to whichever class it appropriately belongs. *Sisters of Visitation v. Glass*, 45 Iowa, 154. The statute contemplates a trial before a court, judge or referee; and such always has been the mode of trial in chancery cases. Witnesses may be examined, and the rights of the parties as fully protected as in any other proceeding in chancery. The defendant, therefore, was not deprived of his liberty or property without due process of law, and therefore the statute is not unconstitutional.

There is a material difference between the present statute and that in force when *Ex parte Grace* was determined. Under the present statute the order for the appearance of the supposed debtor can only be made by the district or circuit court, or a judge thereof, and the examination must be had before one of such courts or judges, or before a referee. Such courts have full and complete jurisdiction of actions at law and proceedings in chancery. They may impanel juries before whom issues may be tried. The judges of said courts have all the powers possessed by judges of courts of general jurisdiction, and the statute under consideration cannot be

said to be unconstitutional because the order for the appearance and examination may be made by a judge; nor can it be so said because the examination is had before the judge, unless the defendant asks to have it before the court; for, if such is his constitutional right, it is clear that such right may be waived. The statute in force when *Ex parte* Grace was determined provided that the order for and examination of the debtor could be made by the county court, or judge thereof, and the examination had before such court or judge. Such court was not a court of general jurisdiction. It had no power to try actions at law or proceedings in chancery. Its jurisdiction was limited and defined by statute. The court in *Ex parte* Grace laid some stress on the character and powers of the court before whom the proceeding was had, and the decision of this court in that case may be sustained because the court and judge thereof did not have the power to impanel a jury, and was not vested with the power and jurisdiction to try issues in actions at law or proceedings in chancery.

III. The Code commissioners recommended that the general assembly should amend the statute under consideration in the Revision, by striking out the words "county court, or judge thereof," and providing that the order for the examination of the debtor should be issued by the district or circuit court, or a judge thereof, and that all the subsequent proceedings should be had before such court or judge. The recommendation was adopted, and the statute re-enacted, and it exists now in other respects in substantially the same form as it did when *Ex parte* Grace was determined. In addition to the foregoing, the Code commissioners recommended the enactment of certain provisions which it may be supposed would, in their opinion, clearly make the statute both constitutional and effective. These last provisions the general assembly failed to adopt, and it is therefore insisted, in substance, that it was the legislative intent that no change should be made to obviate the construction adopted by this court. But we think this conclusion should not be entertained. The statute as it had existed and had been construed, failed to accomplish the results intended by its enactment. It had become practically obsolete. In view of the change made, and the re-enactment of the statute, it may well be supposed that the legislative thought was that the construction which had obtained had been obviated. For the reasons stated, the orders and proceedings before the district court and judge thereof must be

*Affirmed.*



BECK, CH. J., *dissenting*. The statute under which the proceedings in this case were had are the sections of the Code which are here set out:

"SEC. 3135. When execution against the property of a judgment debtor, or one of several debtors in the same judgment, has been issued from the district, circuit or supreme court to the sheriff of the county where such debtor resides; or, if he do not reside in the state, to the sheriff of the county where the judgment was rendered; or a transcript of a justice's judgment has been filed, and execution thereon is returned unsatisfied in whole or in part, — the owner of the judgment is entitled to an order for the appearance and examination of such debtor.

"SEC. 3137. Such order may be made by the district or circuit court of the county in which the judgment was rendered, or to which execution has been issued, or, in vacation, by a judge thereof; and the debtor may be required to appear and answer before either of such courts or judges, or before a referee appointed for that purpose by the court or judge who issued the order, to report either the evidence or the facts.

"SEC. 3140. If any property, rights or credits subject to execution are thus ascertained, an execution may be issued, and they may be levied upon accordingly. The court or judge may order any property of the judgment debtor not exempt by law, in the hands either of himself or any other person or corporation, or due to the judgment debtor, to be delivered up, or in any other mode applied towards the satisfaction of the judgment.

"SEC. 3141. The court or judge may also, by order, appoint the sheriff of the proper county, or other suitable person, a receiver of the property of the judgment debtor, and may also, by order, forbid a transfer or other disposition of the property of the judgment debtor, not exempt by law, or may forbid any interference therewith.

"SEC. 3145. Should the judgment debtor fail to appear, after being personally served with notice to that effect, or should he fail to make full answers to all proper interrogatories thus propounded to him, he will be guilty of contempt, and may be arrested and imprisoned until he complies with the requirements of the law in this respect. And if any person, party or witness disobey an order of the court or judge or referee, duly served, such person, party or witness may be punished as for contempt."

The statute authorizes the district and circuit courts, or the judges thereof, to require a defendant in execution to submit to an



examination under oath (Code, § 313S) as to the property he owns and its disposition. Witnesses may be required to appear and testify in the proceedings. Code, § 3139. The court or judge may, upon such proceedings, order the defendant to surrender any property, found to belong to him, to the court, which shall be held by the receiver. If the order be disobeyed, the defendant may be committed as for a contempt, and be subjected to imprisonment until he obeys the order. The effect of the provision is to authorize a summary proceeding wherein the defendant may be deprived of his liberty.

The constitution of the state (article 1, § 9) declares that "no person shall be deprived of life, liberty or property without due process of law." The term "due process of law" means the ordinary judicial proceedings recognized by law, and provided for determining the rights of property and for subjecting the citizen to deprivation of his liberty for violation of the law. *Boyd v. Ellis*, 11 Iowa, 97; *Ex parte Grace*, 12 Iowa, 208; *Stewart v. Board Sup'rs*, 30 Id., 9. No man may be deprived of his property or liberty under this constitutional provision except upon a judicial determination obtained in the manner prescribed by law for proceedings in the courts. There must be an adjudication had in such proceedings in order to deprive the citizen of his liberty or property. The proceedings authorized by the statute quoted above are summary in their nature. They do not accord with the ordinary course pursued in judicial proceedings. The pivotal questions in the case, — namely, whether defendant owned property, whether he fraudulently disposed of it, whether it was under his control so that he could surrender it, and whether he fraudulently put it out of his control, — were not determined in the manner prescribed for the decision of such questions when the rights of property depend thereon. They were decided in a summary proceeding, and not in a case wherein the usual course of the law was pursued. The difference between this summary proceeding and an ordinary action at law or in chancery need not be suggested to the legal mind. They are many, and essential to the just administration of the law.

It is true that a commitment for contempt may be made in a summary manner; but it can only be made when based upon a prior adjudication of the matter which is the foundation of the contempt. For a disobedience of a lawful order of a court, an offender may be committed as for a contempt. But the order disobeyed, to make the commitment lawful, must have been rendered in the exercise of lawful jurisdiction. An order not made in a cause pend-

ing, or, if in such cause, not in accord with the essential proceedings prescribed by law, will not support a commitment for contempt. So, for contemptuous acts done in the presence of a court, the fact of such acts must be lawfully found and adjudicated by the court before the order of commitment can be made. Such adjudication must be made in the manner recognized by statute or the long-continued practice of the courts. But for contempts not committed in the presence of the court, the order disobeyed must have been made in proceedings which are recognized as being of the "due process of law." I reach the conclusion that the statute above quoted, authorizing the proceedings in this case, is in conflict with the constitution. These views are in accord with and supported by *Ex parte Grace*, 12 Iowa, 208. See, also *State v. Start*, 7 Id., 501.

It is my opinion that the order committing the defendant should be set aside and held for naught, and that a judgment to that effect should be entered here, and certified to the judge of the second judicial district.

ADAMS, J., concurs in this dissent.

### ABBOTT v. OSGOOD.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE. 1859.

[Reported 38 *New Hampshire*, 280.]

DEBT, upon a judgment rendered in the Court of Common Pleas for this county, March term, 1857.

The defendant pleaded that an execution had issued upon said judgment, and thereupon the defendant had been arrested and committed to jail, and that afterward the plaintiffs voluntarily discharged the defendant from confinement, and he was suffered to go at large.

The plaintiffs replied to this, that said discharge, and suffering the defendant to go at large, were on the express condition that the debt and judgment aforesaid should not be discharged.

To this replication the defendant demurred, and the plaintiffs joined in the demurrer.

FOWLER, J. It is admitted by the demurrer in this case, that the defendant was discharged by the plaintiffs from imprisonment on an execution issued upon the judgment now in suit, upon the express condition that the debt in said judgment and the judgment itself should not thereby be discharged. The plaintiffs contend,

that, at common law, a discharge under such circumstances would not invalidate the debt or judgment, and have referred us to the cases of *Vigers v. Aldrich*, 4 Burr. 2482, and *Little v. Newburyport Bank*, 14 Mass. 443, as sustaining their position. An examination of these cases has failed to satisfy us of its correctness.<sup>1</sup> . . .

Upon the whole, therefore, we entertain no doubt that, at common law, the discharge of a debtor from imprisonment upon execution, by consent of the creditor, unless obtained by fraud or force, was in law a satisfaction of the debt and judgment, so that no action could afterwards be maintained upon the judgment for the recovery of the debt.

But the plaintiffs further rely upon the express provisions of the Revised Statutes, to enable them to maintain their action, notwithstanding the established rule of the common law; and we think rightly. The eleventh section of the 185th chapter of those statutes is as follows:

"SEC. 11. No such discharge" [that is, a discharge by two justices of the peace, one of whom is of the quorum, or by the court, at the return day of a writ or execution, as provided for in the two preceding sections], "nor any discharge of any person arrested or imprisoned on execution, shall discharge the debt or judgment upon which the execution issued."

This is clearly a direct and positive enactment, designed and intended to abolish and change the common law rule in such cases, and it seems to us most effectually accomplishing that purpose. It is difficult to conceive what language more explicit could have been employed to effect such a result. It is, as it were, expressly and definitely enacted that after the passage of that act, the common law rule which had previously existed in regard to discharges by consent of the creditor, should no longer prevail, but that thereafterwards no discharge of any person arrested or imprisoned on execution, whether obtained by consent of the creditor or otherwise, should operate to discharge the debt or judgment upon which the execution issued. . . . *Judgment for the plaintiffs.*<sup>2</sup>

<sup>1</sup> The learned judge here discussed the cases of *Vigers v. Aldrich*, 4 Burr. 2482; *Little v. Newburyport Bank*, 14 Mass. 443; *Jaques v. Withy*, 1 D. & E. 552; *Clarke v. Clement & English*, 6 D. & E. 525; *Bassett v. Salter*, 2 Mod. 136; *Thompson v. Bristow*, Barnes' Notes, 205; *Tanner v. Hague*, 7 D. & E. 420; *Da Coster v. Davis*, 1 B. & P. 242; *Perkins v. Pettit & Yale*, 2 B. & P. 440; *Blackburn v. Stupart*, 2 East, 243. — Ed.

<sup>2</sup> As to execution against the person, see 3 Freeman, Executions, 3d ed., Chap. XXXIII. — Ed.

## CHAPTER XIII.

### THE EFFECT OF A JUDGMENT ON SUBSEQUENT CONTROVERSIES.

HOFFMEIER and HOFFMEIER, Trading, &c., as  
C. C. HOFFMEIER & SON, *v.* TROST.

SUPREME COURT OF NEW JERSEY. 1912.

[Reported 83 *New Jersey Law*, 358.]

TRENCHARD, J. This suit was brought in the District Court to recover \$475 claimed to be due the plaintiffs below under a stop notice given pursuant to section 3 of the Mechanics' Lien act (Comp. Stat., p. 3294), and was tried before the judge without a jury.

On March 5th, 1910, the defendant entered into a written contract with one Waldons for the construction of a building. The contract was filed in the county clerk's office. On March 18th, 1910, Waldons entered into a subcontract with the plaintiffs for the plumbing and heating work. There became due the plaintiffs on such subcontract the sum of \$1,375. After demand upon Waldons, and his refusal to pay, the plaintiffs, on October 10th, 1910, served a notice in writing on the defendant, as owner, of the amount due them, and for the retention thereof, under section 3 of the Mechanics' Lien act (Comp. Stat., p. 3294), from any moneys due to Waldons from the defendant. On December 17th, 1910, the defendant paid the plaintiffs \$900, on account of their claim, leaving a balance of \$475, for which this suit is brought.

The trial judge gave judgment for the defendant upon the ground that the matter was *res adjudicata*.

We think that action erroneous.

It is true it appeared at the trial that the plaintiffs had previously brought suit in another District Court, *based upon a contract alleged to have been made on July 29th, 1910*, to pay for the same labor and materials, and that judgment in that suit was rendered for the defendant.

But a matter is not *res adjudicata* unless there be identity of the thing sued for, of the cause of action, of the persons and parties,



the quality of the persons for and against whom the claim is made, and the judgment in the former action be so in point as to control the issue in the pending one. *Mershon v. Williams*, 34 Vroom 398.

A proper test in determining whether a prior judgment between the same parties concerning the same matters is a bar to a subsequent action is to ascertain whether the same evidence, which is necessary to sustain the second action, would have been sufficient to authorize a recovery in the first; if so, the prior judgment is a bar. But if the evidence offered in the second suit is sufficient to authorize a recovery, but could not have produced a different result in the first suit, the failure of the plaintiff in the first suit is no bar to his recovery in the other suit. 23 Cyc. 1158.

Applying that test to the case in hand, it is plain that the former judgment for the defendant is not a bar. As we have pointed out, that suit appears to have been based upon a *contract alleged to have been made on July 29th, 1910*, to pay for the labor and materials bestowed upon the building. That alleged contract had no relation to any rights which may have accrued to the plaintiffs under the Mechanics' Lien act. In the present action recovery is sought by reason of a stop notice given under the Mechanics' Lien act, not under the alleged contract upon which the first suit was based. Obviously, the proofs which justified (nothing else appearing) a recovery by force of section 3 of the Mechanics' Lien act would not have authorized a recovery for the plaintiffs in the first suit.

It follows, therefore, that the judgment under review cannot be sustained upon the ground stated by the trial judge.

Nor does the record disclose any other ground upon which it can be sustained.

Whether the plaintiffs may recover on a new trial will, it seems likely, depend upon a proper determination of several questions, among others, the question of blended law and fact respecting whether the plaintiffs, as is contended, made a valid agreement on December 17th, 1910, to prorate their claim, and, if they did, its effect upon their claim.

The judgment below will be reversed and a new trial awarded.<sup>1</sup>

<sup>1</sup> *Newhall v. Enterprise Mining Co.*, 205 Mass. 585, 91 N. E. 905, 137 Am. St. Rep. 461, *accord.* — ED.

## SANDERS v. HAMILTON.

KING'S BENCH DIVISION. 1907.

[Reported 96 *Law Times Reports*, 679.]

DARLING, J.<sup>1</sup> In this case it appears that the plaintiff brought an action in detinue, and he claimed 14*l.* as the value of the goods detained, and a further sum as damages for their detention. The defendant paid the whole amount claimed into court. I am not going into what happened on the interlocutory proceedings, but the money paid in was taken out by the plaintiff. The latter then brought another action for the same detinue of the same goods, putting their value at a higher figure than in the previous action, and giving credit for the amount he had already received. He claimed the right to maintain this action to recover further damages for the same cause of action, on the ground that in making his first claim he had underestimated the value of the goods detained. The learned judge has decided that this action is maintainable because he feels himself bound by the decision in the case of *Dewar v. Winder* [12 *Times L. Rep.* 54]. I think the ordinary law on this subject is contained in the maxim *Nemo debet bis vexari* and also in the maxim that when once a matter is *res judicata* that prevents another action being brought for the same cause. I do not think that the case of *Dewar v. Winder* is really an authority the other way. If so it is the only authority to be found in the books for the proposition that a subsequent action may be brought for the same cause of action, if the damages claimed in the first action are, by mistake insufficient. There are many authorities to the contrary.<sup>2</sup> . . .

OIL WELL SUPPLY COMPANY v. KOEN *et al.*

SUPREME COURT OF OHIO. 1901.

[Reported 64 *Ohio State*, 422.]

ERROR to the Circuit Court of Monroe county.

Action on account for goods sold. Plea of former recovery. Reply that the judgment was against a non-resident of the state, on constructive service only. Demurrer to reply sustained, and action dismissed. Reversed.

<sup>1</sup> Only a part of the opinion of Darling, J., is here given. — Ed.

<sup>2</sup> See *Ewing v. McNairy*, 20 *Oh. St.* 315. (But see *Ohio Gen. Code*, sec. 11642.) Compare *Nebraska Loan & Trust Co. v. Domon*, 4 *Neb. (Unof.)*, 334. — Ed.

The action below was brought in the court of common pleas of Monroe county, by the Oil Well Supply Company against O. N. Koen and Charles Barrows, on an account for merchandise sold and delivered by the plaintiff to the defendants, amounting to the sum of \$1,574.51. The defendant Koen alone answered, pleading in bar of the action, a former recovery on the same cause of action, in the court of common pleas of Washington county. The plaintiff replied that, when the former action was brought, the defendant Koen was a non-resident of this state, and on that ground a writ of attachment was issued in the action, under which certain chattel property of the defendant then in the jurisdiction of the court was attached, and afterward sold, and the proceeds, amounting to the sum of \$714, was applied, by order of the court, on the costs, which amounted to \$49.50, and the balance of \$664.50 was paid on the plaintiff's claim; which last amount the plaintiff admits should be credited on the account sued on in this case. The reply also avers that "no summons was served on the defendant in said action, nor did he appear therein, nor was jurisdiction over the person of said defendant otherwise acquired therein"; but, "service by publication of notice to said defendant was duly made according to law, under clause 3, of section 5048, of the Revised Statutes." A general demurrer was sustained to the reply, the petition dismissed, and judgment rendered against the plaintiff for costs; and from the affirmance of that judgment by the circuit court, error is prosecuted to this court. . . .

WILLIAMS, J.<sup>1</sup> If the court in Washington county had jurisdiction to render the judgment set up in the answer, this action obviously cannot be maintained. It is fundamental that a valid judgment rendered on a demand establishes it in the most authentic form known to the law, and the demand so merged in the judgment cannot be made the basis of another action between the same parties; thereafter the judgment is a new debt of a higher nature which may itself be the foundation of an action. But it is equally clear that the judgment, to have that effect, must be one rendered by a court having jurisdiction of the parties, as well as of the subject matter; and if the court was without such jurisdiction, its judgment is as unavailing as a defense to a suit on the original demand, as it would be in support of an action founded on the judgment. The demurrer to the reply admits that in the former action no summons was served on the defendant, who, during its pendency, was a non-resident of this state, and that no jurisdiction

<sup>1</sup> A part of the opinion is omitted. — Ed.

was obtained by the court otherwise than by the seizure of his property on the attachment, and service by publication as authorized in such cases. Jurisdiction, upon such service, to subject property within the reach of the court's process to the satisfaction of the debts of its non-resident owner, is not questioned, nor is the power of the state to confer such jurisdiction on its courts. But a proceeding of that nature is essentially one *in rem*, and the jurisdiction is acquired only where property of the defendant is brought within the control of the court, and is exhausted by the appropriation of the property on the plaintiff's demand. The judgment rendered as the basis for the distribution of the attached property to its payment will not support an execution against other property of the defendant for the collection of any balance then remaining unpaid. There is an entire lack of power in the court to render a valid judgment *in personam* against a resident of another state, who has neither been summoned nor voluntarily entered his appearance. Constructive service has no further effect than to give regularity to the proceedings for the proper application of the attached property. . . .

We are thus brought to the conclusion that, upon the facts appearing in the pleadings, the balance remaining unpaid on the plaintiff's claim after the application of the proceeds of the property attached in the Washington county case, was not merged in the judgment therein rendered, and that judgment is not a bar to the present action.

*Judgment reversed.*<sup>1</sup>

MINSHALL, C. J., BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

## BRUNSDEN v. HUMPHREY.

COURT OF APPEAL. 1884.

[Reported 14 *Queen's Bench Division*, 141.]

APPEAL of the plaintiff against an order of the Queen's Bench Division making absolute a rule to enter judgment for the defendant. The facts are set out in the report of the proceedings before the Queen's Bench Division and also are briefly noticed in the judgments of Brett, M. R., and Bowen, L. J., and it will be here sufficient to state that the plaintiff, whilst he was driving his cab,

<sup>1</sup> Compare *Melhop & Kingman v. Doane & Co.*, 31 Ia. 397; *Whittier v. Wendell*, 7 N. H. 257; *National Bank v. Peabody & Co.*, 55 Vt. 492, in which the prior judgment was rendered in another state. — ED.



came into collision with a van of the defendant through the negligence of the defendant's servant, whereby he sustained bodily injury and his cab was damaged, and that the plaintiff, before the present action, sued the defendant for damage to his cab in a county court, and the defendant paid into court a small sum which was accepted, and thereupon the action in the county court was discontinued. Upon these facts the Queen's Bench Division entered judgment for the defendant (11 Q. B. D. 712).

BRETT, M. R.<sup>1</sup> This case was heard before Pollock, B., and Lopes, J. The plaintiff was a cabman driving in his vehicle, when he was run into by the defendant's vehicle. The collision was caused by the negligence of the defendant's servant. In the case in which the present appeal is brought, the plaintiff has sued the defendant for injury done to his person. The jury have found a verdict for £350, shewing clearly that the personal injuries were serious. Before this the plaintiff had brought an action in the county court for damage to his cab, by which he recovered a certain amount. In this second action it was urged that the plaintiff could not succeed, because no person can sue twice for one and the same cause of action. On the other side it was contended that there were two distinct causes of action, and that there was no law to prevent two actions: that it might be sometimes oppressive to bring two actions, but that in that event the Court might summarily stay one of them, and that in the present case the two actions were not oppressive. The question is whether there are two causes of action, or whether there is only one; and if there is but one cause of action, the present suit is not maintainable. For the defendant, reliance has in effect been placed upon the maxim, *Interest reipublice ut sit finis litium*; and it has been contended that it enunciates an admirable rule of law. When that rule is applied to damages which are patent, it is a good rule; but where damages are afterwards developed, it is not a rule to be commended. It is a rule which sometimes produces a harsh result, and if it were now for the first time put forward, I could not assent to its being pushed to the length to which it has sometimes been carried: in fact it is never wanted except when injury, undeveloped at the time of action brought, is afterwards developed. However, the maxim exists, and it must receive a proper application. But, in order to apply it, we must often suppose what is not the case. It is to be assumed that the subsequent damage was in the contemplation of the person injured. The question, however, remains whether the

<sup>1</sup> The concurring opinion of Bowen, L. J., is omitted. — Ed.

cause of action is the same. In this case the injury was occasioned by the negligent driving of the defendant's servant. Suppose that by the negligent driving of the defendant's servant the van had run against the plaintiff's cab, and had injured him without doing any damage to the cab: an action would have lain, and any apparent bodily injury which the plaintiff might have sustained would be a cause of action. Suppose that the defendant's servant by his negligent driving had damaged the plaintiff's cab without injuring him personally: under circumstances of that kind the cause of action would be a damage to the plaintiff's property. The owner of property has a right to have it kept free from damage. The plaintiff has brought the present action on the ground that he has been injured in his person. He has the right to be unmolested in all his bodily powers. The collision with the defendant's van did not give rise to only one cause of action: the plaintiff sustained bodily injuries in a distinct right, and he became entitled to sue for a cause of action distinct from the cause of action in respect of the damage to his goods: therefore the plaintiff is at liberty to maintain the present action. Different tests have been applied for the purpose of ascertaining whether the judgment recovered in one action is a bar to a subsequent action. I do not decide this case on the ground of any test which may be considered applicable to it; but I may mention one of them; it is whether the same sort of evidence would prove the plaintiff's case in the two actions. Apply that test to the present case. In the action brought in the county court, in order to support the plaintiff's case, it would be necessary to give evidence of the damage done to the plaintiff's vehicle. In the present action it would be necessary to give evidence of the bodily injury occasioned to the plaintiff, and of the sufferings which he has undergone, and for this purpose to call medical witnesses. This one test shews that the causes of action as to the damage done to the plaintiff's cab, and as to the injury occasioned to the plaintiff's person, are distinct. Therefore we are not now called upon to apply a legal maxim, the application of which ought not to be stretched. The plaintiff is entitled to recover the sum of £350, awarded by the jury. Two actions may be brought in respect to the same facts, where those facts give rise to two distinct causes of action.

LORD COLERIDGE, C. J. In this case I am with much regret unable to concur in the judgment of my Brother Bowen, to which I understand the Master of the Rolls to assent. I should have been glad in the face of this difference of opinion to have given

reasons at length for my inability to agree in the judgment. But the plaintiff very naturally presses for judgment, and I am unable to do more than shortly to express my dissent. It appears to me that whether the negligence of the servant, or the impact of the vehicle which the servant drove, be the technical cause of action, equally the cause is one and the same; that the injury done to the plaintiff is injury done to him at one and the same moment by one and the same act in respect of different rights, i. e. his person and his goods, I do not in the least deny; but it seems to me a subtlety not warranted by law to hold that a man cannot bring two actions, if he is injured in his arm and in his leg, but can bring two, if besides his arm and leg being injured his trousers which contain his leg, and his coat-sleeve which contains his arm, have been torn. The consequences of holding this are so serious, and may be very probably so oppressive, that I at least must respectfully dissent from a judgment which establishes it. I think that the Court below was right, and that this appeal should be dismissed.

*Judgment reversed.*<sup>1</sup>

### WILBUR, Executor, v. GILMORE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1838.

[Reported 21 *Pickering*, 250.]

TRESPASS *quare clausum*. The action was submitted to referees, under a rule of court. They awarded to the plaintiff the sum of \$5, as the actual value of wood and timber cut and carried away by the defendant, and submitted to the determination of the Court the legal questions arising in the case.

The trespass was committed in the lifetime of the plaintiff's testator. In the year 1835, the plaintiff commenced a suit against

<sup>1</sup> *Reilly v. Sicilian Asphalt Paving Co.*, 170 N. Y. 40, 62 N. E. 772, *accord*. But see *Doran v. Cohen*, 147 Mass. 342, 17 N. E. 647.

As to what causes of action are severable, see 2 Black, *Judgments*, 2d ed., sec. 735; 1 Freeman, *Judgments*, 4th ed., secs. 238-243; 1 Van Fleet, *Former Adjudication*, Chap. V.

A plaintiff against whom judgment has been given cannot recover on the same cause of action although he urges grounds for recovery not urged in the prior action. See *United States v. California & Oregon Land Co.*, 192 U. S. 355, 48 L. ed. 476, 24 S. Ct. 266, in which case Holmes, J., said "The whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim; and, *a fortiori*, he cannot divide the grounds of recovery." — Ed.

the defendant for the same cause of action. To that suit there was a general demurrer and joinder in the Court of Common Pleas, and judgment was there rendered that the declaration was bad and that the defendant recover his costs. The defendant insisted that those proceedings were a bar to the present action. . . .

If the Court should be of opinion that the former proceedings were not a bar to this suit and that the plaintiff had a right to maintain this action, judgment was to be entered that the award in favor of the plaintiff be accepted; and if otherwise, the defendant was to recover his costs according to the award.

MORTON, J.<sup>1</sup> . . . The former judgment was rendered on a general demurrer to the declaration, and is no bar to this action.

The general rule undoubtedly is, that the judgment in one action shall bar all other suits between the same parties and for the same cause of action. *Interest reipublice ut sit finis litium*. But this rule is limited to judgments rendered on the merits. If the plaintiff be nonsuit for want of proof, or because his *allegata* and *probata* do not agree, or for any other cause, he may commence another action. 1 Chitty on Pl. (5th ed.) 227; Gould on Pl. 478. Even a judgment of nonsuit on the merits, or on an agreed statement of facts, has been holden to be no bar to another action. *Knox v. Waldoborough*, 5 Greenl. 185; *Bridge et al. v. Sumner*, 1 Pick. 371. So if the plaintiff mistake the form of his action, as if he brings trespass instead of trover, and his writ be adjudged bad on demurrer, the judgment will not bar an action of trover. 1 Chit. Pl. (5th ed.) 227; Gould on Pl. 478, § 46. So if the plaintiff mistake his cause of action and the defendant demur and have judgment, this will not preclude the plaintiff from commencing a fresh action, correctly setting forth the right cause. So also if the declaration be demurred to, or a bad plea be pleaded and demurred to, and a judgment be rendered against the plaintiff for the insufficiency of his declaration, it will not estop the plaintiff from bringing another action to enforce the same right; because the case as stated in the last declaration was not tried in the first. In all these cases, if the defendant plead the former judgment in bar, the plaintiff may reply that it was not obtained on the merits. 1 Chit. Pl. (5th ed.) 227; Gould on Pl. 478, § 45; Vin. Abr. Judgment, (Q 4); *Lampen v. Kedgewin*, 1 Mod. 207. In this last case, North C. J. says, "there is no question but that if a man mistakes his declaration and the defendant demurs, the plaintiff may set it right in a second action."

<sup>1</sup> A part of the statement of facts and a part of the opinion are omitted. — Ed.



It is apparent from the record, that the former judgment between these parties, was rendered upon the insufficiency of the declaration and not upon the merits of the case, and therefore can be no bar to the present action.

*Award of referees accepted.*<sup>1</sup>

ROBINSON, Trustee of HOWARD, *v.* HOWARD.

SUPREME COURT OF CALIFORNIA. 1855.

[Reported 5 *California*, 428.]

APPEAL from the Superior Court of the City of San Francisco.

This was an action brought to foreclose a mortgage made by the respondent, C. G. Howard, to secure the performance of a contract made by Howard and his wife, Anna D. Howard.

By that contract, in contemplation of a future separation of the wife from the husband, and in consideration thereof, he agreed to pay to her, through Robinson as trustee, \$100 per month, as long as she should live separate and apart from him.

Robinson first brought an action at law, in the Twelfth District Court, to recover the sum of \$300, then alleged to be due on said contract, setting forth the contract *verbatim* in the complaint. Howard demurred, on the ground that the contract was void on its face, and that according to the case made, the plaintiff had no cause of action. The issue on demurrer involved the whole merits of the case. The demurrer was sustained, and there was judgment final for the defendant in due course of law.

The respondent, in answering the complaint in this case, pleaded specially in bar the record and judgment above mentioned. On reading the judgment record upon the trial in this case, it was held to be conclusive, and the Court dismissed the complaint. Plaintiff appealed.

HEYDENFELDT, J., delivered the opinion of the Court. MURRAY, C. J., concurred.

There can be no doubt that the first judgment set up in the answer was a bar to this suit. A judgment upon demurrer is not always a bar to a subsequent action, but only when it determines the whole merit of the case.

<sup>1</sup> *Lampen v. Kedgewin*, 1 Mod. 207, *accord*. See 2 Black, Judgments, 2d ed., *secs.* 693 *et seq.*; 1 Freeman, Judgments, 4th ed., *secs.* 263 *et seq.* — Ed.

Here the averment of the answer shows that the demurrer went to the validity of the contract which gave rise to the claim, and this averment is found to be true as alleged, by the Judge at *nisi prius*, upon inspecting the record of that case.

*Judgment affirmed.*<sup>1</sup>

LOUISVILLE & NASHVILLE RAILROAD COMPANY  
v. BEASLEY & BEASLEY.

SUPREME COURT OF TENNESSEE. 1911.

[Reported 123 *Tennessee*, 629.]

NEIL, J. Plaintiffs below, Beasley & Beasley, brought an action against the railroad company in 1908 before a justice of the peace for injury inflicted upon certain cattle in course of shipment. There was a judgment before the justice for \$49.07, and an appeal prayed and prosecuted to the circuit court of Trousdale county. There the case was tried before the court and jury, and resulted in a verdict in favor of the plaintiffs. A motion in arrest of judgment was then made for a defect of substance in the statement of the cause of action in the warrant sued out before the justice of the peace (*Railway Co. v. Flood*, 122 Tenn., 56, 113 S. W., 384), and sustained, and the suit dismissed. In 1909 a second action was brought before a justice of the peace of the same county on the same cause of action, and a judgment rendered as before, and an appeal to the same circuit court. In that court the defendant interposed a plea of *res adjudicata*, based on the former proceeding. The plea was overruled, and it was then agreed by the parties that the plaintiff was entitled to a judgment on the merits of the controversy, unless the plea of *res adjudicata* could be lawfully held effective on the facts just presented. A judgment was then entered in favor of the plaintiffs, and an appeal prayed to the court of civil appeals. In that court the action of the circuit judge was affirmed, and a petition for *certiorari* was then filed in this court, presenting the same question here.

We are of the opinion that the court of civil appeals reached the correct conclusion. "After the arrest of judgment a new action may be brought, and the proceeding in the action wherein the

<sup>1</sup> See *Northern Pac. Ry. Co. v. Slaght*, 205 U. S. 122, 51 L. ed. 738, 27 S. Ct. 446; *Vanlandingham v. Ryan*, 17 Ill. 25; 2 Black, *Judgments*, 2d ed., secs. 707-710. — Ed.

judgment was arrested cannot be pleaded either in bar or in abatement." Am. and Eng. Enc. of L. and Pr., vol. 5, p. 557. In addition to the foregoing, the point is covered by our statute, which reads: "If the action is commenced within the time limited, but the judgment or decree is rendered against the plaintiff upon any ground not concluding his right of action, or where the judgment or decree is rendered in favor of the plaintiff, and is arrested, or reversed on appeal, the plaintiff, or his representatives and privies, as the case may be, may, from time to time, commence a new action within one year after the reversal or arrest." Shannon's Code, sec. 4446.

Of course, this section was primarily intended to prevent the running of the statute of limitations in the cases mentioned, but it necessarily implies the existence of a cause of action otherwise valid. This section, moreover, contemplates a case wherein a motion in arrest of judgment was granted for matter of substance, because under section 4585 of the same Code motions in arrest of judgment for matters of form in civil suits are abolished.

It results that the petition for *certiorari* must be refused.

### WOOD v. FAUT.

SUPREME COURT OF MICHIGAN. 1884.

[Reported 55 *Michigan*, 185.]

SHERWOOD, J. The declaration in this case is on the common counts in assumpsit, accompanied by a bill of particulars consisting of three items. The plea is the general issue with notice of former suit and adjudication of the same matter in bar. The case originated in justice's court where the plaintiff had judgment, and on appeal to the circuit the plaintiff again obtained judgment, and the proceedings therein had are before us on error for review. The cause was tried before the circuit judge without a jury, and the case comes up on special findings; the record containing also a bill of exceptions.

There was testimony supporting all the findings of fact, and from these findings it appears that another suit had previously been brought by the plaintiff against the defendant for the same cause before a justice of the peace in Mackinaw county, and a judgment rendered therein of no cause of action and for costs; that the declaration in the former suit was verbal on the common counts, and

showed none of the items or particulars of the plaintiff's claim; that the plea in the case was also verbally made, being the general issue, with notice of recoupment and set-off, with no particulars stated; that it was urged by the defendant on the former trial that the plaintiff's suit was prematurely brought, his claim not being due when the action was commenced, and that the justice so held and did not pass upon the merits of the plaintiff's claim, but made no entry upon his docket to that effect, other than his giving the judgment stated.

The circuit court permitted the justice and counsel in the case to testify as to what claims were made and litigated upon that trial, and the former to state that he gave judgment for the defendant upon the sole ground that the plaintiff's claim was not due, and that he did not pass upon the merits.

Upon the testimony given the circuit judge found the above to be the facts. To the admission of this testimony and the findings of the circuit judge the defendant objected and took his exceptions.

We think the ruling of the court was correct, and the judgment well supported by the findings. Nothing appears in the pleadings or the record in the suit tried before the justice, showing what particular claims or items were litigated or passed upon in that court. The findings of the circuit judge show that the claim of the plaintiff was not then due. In order to bar the plaintiff's claim it must appear that he had a legal right to bring his action therefor when his suit was brought, and that in the litigation had, the merits of his claim were passed upon by the justice in giving judgment. *Tucker v. Rohrback*, 13 Mich. 73. The evidence offered under the circumstances of this case was proper to show that the merits of the plaintiff's claim were not litigated or passed upon in the former suit. *Lyman v. Becannon*, 29 Mich. 466.

We find no error in the record and the judgment must be affirmed.<sup>1</sup>

The other Justices concurred.

<sup>1</sup> *Brackett v. People*, 115 Ill. 29, 3 N.E. 723; *Bacon v. Schepflin*, 185 Ill. 122, 56 N. E. 1123 (*semble*); *State of Wisconsin v. Torinus*, 28 Minn. 175, 9 N. W. 725, *accord*. See 2 Black, *Judgments*, 2d ed., sec. 714; 1 Freeman, *Judgments*, 4th ed., sec. 268. — ED.



GUMMER v. THE TRUSTEES OF THE VILLAGE  
OF OMRO.

SUPREME COURT OF WISCONSIN. 1880.

[Reported 50 *Wisconsin*, 247.]

ORTON, J. This is an appeal from an order of the circuit court overruling a demurrer to the second defense stated in the answer. This defense sets up a judgment of nonsuit in a former action between the same parties, and for the same cause of action, in bar of this suit. The statement in the answer of the proceedings in the former action, any further than that the nonsuit was granted by the court, on the trial without a jury, after the plaintiff had closed his evidence, on motion of the defendant, need not be recited, because it does not change the effect of the judgment. Nor does the peculiar and unusual form of the judgment, as entered by the clerk, upon sustaining the motion of the defendant for a nonsuit, change its effect. It is, in effect, a judgment of nonsuit and for costs, against the plaintiff, on the case made by him, on the motion of the defendant. On such a motion the court must necessarily consider and pass upon the legal effect of the evidence introduced by the plaintiff, and the formal entry of the judgment by the clerk, dismissing the complaint and for costs against the defendant, does not affect the question.

The only question, then, presented by this appeal is, whether that judgment is a bar to the present suit. It is not contended by the learned counsel of the respondent that a voluntary nonsuit bars another action, but only that an involuntary nonsuit, so granted on the motion of the defendant, has that effect. The practice of granting such a nonsuit is an old one even in England, where the evidence of the plaintiff is insufficient to entitle him to a verdict, and where a judgment for the plaintiff upon it would be arrested. *Sadler v. Robins*, 1 Campb., 256. And such a practice has been followed in this country in nearly all of the states. It is significant that no case in point has been found, upon a quite extended examination of the reports, in which it has been directly held that such a nonsuit is a bar. In some cases it has been held that the practice of granting such a nonsuit on motion of the defendant is analogous to a demurrer to the evidence, where judgment upon such a demurrer is not final as at common law, but where, after such a demurrer has been overruled, the defendant may, notwithstanding, proceed with his defense. *Smyth v. Craig*, 3 Watts & Serg., 18; *Bevan v.*

Ins. Co., 9 Watts & Serg., 187; *Levy v. Simmons*, 42 Ga., 53. In these cases the demurrer to the evidence was treated as a motion for a nonsuit. If the overruling of such a demurrer is not conclusive upon the defendant, it would seem that sustaining it ought not to be conclusive upon the plaintiff to bar him of another suit.

But, in whatsoever manner or by whatsoever analogy this practice may have obtained, the effect of such a nonsuit seems to be precisely the same as that of a nonsuit asked, taken or submitted to by the plaintiff, or that of a voluntary nonsuit, so called; and it makes no difference whether the form of such a judgment be the dismissal of the suit or of the complaint. *Bond v. McNider*, 3 Ired. Law, 440. In that case the entry was, "dismissed at defendant's cost." The court held that it was in effect a nonsuit, and no bar to another action.

In *McKinney v. Finch*, 1 Scam., 152, a justice of the peace dismissed the suit for insufficiency of proof; it was held in effect a nonsuit and no bar. In *Elwell v. McQueen*, 10 Wend., 519, the court uses the following language: "A justice, at the trial, has a right to nonsuit the plaintiff, if, in his judgment, he fails upon his own showing to make out his case, either on the ground of the incompetency or the insufficiency of his evidence, and a judgment of nonsuit in such a case is no bar to another action for the same cause." To the same effect are *Coit v. Beard*, 33 Barb., 357, and *Audubon v. The Excelsior Ins. Co.*, 27 N. Y., 216. On a nonsuit the plaintiff pays costs as if the defendant obtained a verdict. *Bicknell's Pr.*, 140; *Cowper*, 407; 1 *Strange*, 300. The only difference between a dismissal and a nonsuit is said to be, that the former must be made before the jury returns into court. *Bicknell's Pr.*, 140; 3 *Black. Com.*, 376. The books of practice agree that there is no difference in the effect of the judgment between a voluntary and an involuntary nonsuit. *Freeman on Judgments*, § 261, cites many authorities to sustain his text asserting the same principle. 2 *Whittaker's Pr.*, 357; 3 *Wait's Pr.*, 163. That the facts in evidence given by the plaintiff are fully considered by the court, upon a motion for a nonsuit, in determining the question whether in law they entitle the plaintiff to recover, constitutes no such trial on the merits as to make the nonsuit a bar. It is the form of the judgment of nonsuit which gives to it its legal effect, and not the facts considered on the motion. *Fisk v. Parker*, 14 La. An., 491.

We conclude, then, that a judgment of nonsuit, whether voluntary or involuntary, is never a bar to another action for the same

cause. This rule in respect to involuntary nonsuits is not only sustained by the authorities, but by reason, and is evidently recognized generally by the courts and the bar, from the common practice of nonsuits granted on motion, without a question as to their effect on barring another action. The defendant, instead of moving for a nonsuit on the case made by the plaintiff, may, if he have confidence in his position, have a judgment which will be a bar to another action by submitting the cause to the verdict of a jury, or to the court, if a jury be waived. He should not be allowed to experiment with a motion for a nonsuit, and obtain the opinion of the court of the plaintiff's case, and, if he fails in his motion, then go to a full trial on the merits, without also allowing the plaintiff, if he is the losing party on the hearing of the motion, to sue over. If the defendant is not bound and concluded by the decision of the motion, the plaintiff should not be; and if the rule is adopted that a nonsuit granted upon the motion of the defendant is a bar to another action, then the correlative rule should be adopted also, that a decision against the motion operates as a judgment for the plaintiff. This rule as to the effect of the judgment will encourage the practice of moving for a nonsuit on the case made by the plaintiff, and thus often save the time and expense of a full and needless trial, when the plaintiff has failed to sustain his action, by incompetency or insufficiency of proof.

The question first discussed in the brief of the learned counsel of the respondent, as to the sufficiency of his first defense, will not be considered, because not here on this appeal.

By the Court. The order of the circuit court overruling the demurrer to the second defense of the respondent's answer is reversed, with costs, and the cause remanded for further proceedings according to law.<sup>1</sup>

<sup>1</sup> See *Dencen v. Street Ry. Co.*, 150 Mich. 235, 113 N. W. 1126, 13 Ann. Cas. 134; *Mason v. Kansas City Belt Ry. Co.*, 226 Mo. 212, 125 S. W. 1128, 26 L. R. A. (N. S.), 914; *Coit v. Beard*, 33 Barb. (N. Y.), 357; *Holland v. Hatch*, 15 Oh. St. 464; *Robinson v. Merchants', etc., Co.*, 16 R. I. 637, 19 Atl. 113; 23 Cyc. 1136. Compare *Poyser v. Minors*, 7 Q. B. D. 329; *Strehlau v. Lumber Co.*, 152 Wis. 589, 140 N. W. 26. — Ed.

THORESON and Another v. MINNEAPOLIS  
HARVESTER WORKS.

SUPREME COURT OF MINNESOTA. 1882.

[Reported 29 *Minnesota*, 341.]

THIS action is brought to recover damages for breach of warranty made upon the sale of a reaping machine by the defendant to the plaintiffs. The answer sets up, as a bar to this action, a judgment of the municipal court of St. Paul, entered by default against the plaintiffs on two of the promissory notes given for the reaper.<sup>1</sup>

DICKINSON, J. . . . The former recovery of a judgment by this defendant against the plaintiffs, on default of the latter upon some of the notes given for the purchase of the machine, constituted no bar to a recovery in this action for breach of the contract of warranty. The facts constituting the cause of action in this case were not involved in the former action upon the notes, and could only have been properly presented for adjudication therein by affirmative allegations and proof, on the part of the defendants in such action, in the nature of counterclaim or recoupment. Formerly, in such an action, the practice allowed a full recovery of the purchase price, and left the vendee to seek his remedy by a cross-action. *Mondel v. Steel*, 8 M. & W. 858; *Rigge v. Burbidge*, 15 M. & W. 598. Now the vendee has his election to plead the breach of contract of warranty in reduction of damages, in an action brought by the vendor for the price, or to bring a cross-action, as was done in this case. Such action is not barred by the former recovery of the price. *Davis v. Hedges*, L. R. 6 Q. B. 687; *Bodurtha v. Phelon*, 13 Gray, 413; *McKnight v. Devlin*, 52 N. Y. 399; *Barker v. Cleveland*, 19 Mich. 230; *Benjamin on Sales* (3d Ed.), 894, 899.<sup>2</sup> . . .

## BERMAN v. HENRY N. CLARK COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1907.

[Reported 194 *Massachusetts*, 248.]

CONTRACT for a breach of a contract of warranty in writing which is quoted in the first paragraph of the opinion. Writ in the Municipal Court of the City of Boston dated January 7, 1905.

<sup>1</sup> The statement of facts is abridged, and a part of the opinion is omitted. — Ed.

<sup>2</sup> See *Davis v. Hedges*, L. R. 6 Q. B. 687; 2 Black, Judgments, 2d ed., secs. 761 *et seq.*; 1 Freeman, Judgments, 4th ed., secs. 277 *et seq.* — Ed.



The answer contained a general denial, and also set up as a bar the judgment which is described in the opinion.

On appeal to the Superior Court the case was tried before Crosby, J., who ordered a verdict for the defendant, and at the request of the plaintiff reported the case for determination by this court. If the direction was wrong as a matter of law, the verdict was to be set aside and such disposition was to be made of the case as law and justice might require. If the direction was correct, judgment was to be entered for the defendant on the verdict.

The case was submitted on briefs.

KNOWLTON, C. J. The defendant made a contract in writing to furnish and put in place specific apparatus for heating three houses belonging to the plaintiff. The contract contained a guaranty as follows: "We guarantee this apparatus to be complete in every way and when finished to be capable of warming all rooms in which radiators are placed to 70° in zero weather. We guarantee this apparatus against all imperfections in material and workmanship for one year." This action is brought to recover upon this guaranty.

An earlier action was brought by the defendant company against the plaintiff, to recover the price of this apparatus, and for extra work in connection with the contract. As a defence to this former action, the present plaintiff answered, denying that the plaintiff in that action had fulfilled its contract, and averring that it failed to provide apparatus which complied with the guaranty contained in the contract, in that the apparatus furnished has been and was unable to heat the apartments to seventy degrees in zero weather, etc., and claiming a recoupment of damages. After a trial upon these pleadings, the plaintiff in that action recovered from the present plaintiff the full amount claimed in its declaration. The only question now before us is whether the judgment in the former action is a bar to the present one.

We think it plain that it is. The principles applicable to the case were considered in *Gilmore v. Williams*, 162 Mass. 351, in *Bradley v. Bradley*, 160 Mass. 258, and in *Watts v. Watts*, 160 Mass. 464. See also *Morse v. Elms*, 131 Mass. 151. In *Gilmore v. Williams* it was said of the plaintiff, seeking to recover on a breach of warranty, he having previously set up this breach as a defence to an action upon the note given in consideration of the warranty, "if he chose to plead the breach of warranty in answer to the claim on the note, and if a judgment was entered against him for the whole amount due on the note, or a part of it, on the

issue thus raised, the judgment would be a bar to any further claim under the warranty. This would be so whether the judgment was entered by consent of parties, or upon a default after answer, or upon a verdict after trial on the facts. His election to claim his damages by way of recoupment in that suit would be conclusive on him." This doctrine is conclusive against the right of the plaintiff to recover in the present case. There is a well recognized distinction, referred to in the cases above cited, between the effect of a judgment pleaded as an estoppel as to facts arising collaterally in another action, and its effect as a final determination of the matters declared on as the cause of action, or set up in the answer as a ground for an allowance in defence.

It is immaterial that there had been no zero weather before the trial of the first action. The capacity of the apparatus was put in issue, and could be shown otherwise than by actual experiment. Evidence was introduced on the subject, and it would have been in the power of the court, upon motion, to continue the case for trial until there was an opportunity for an experiment, if it had been thought advisable to do so. *Judgment on the verdict.*<sup>1</sup>

## CROMWELL v. COUNTY OF SAC.

SUPREME COURT OF THE UNITED STATES. 1876.

[Reported 94 *United States*, 351.]

ERROR to the Circuit Court of the United States for the District of Iowa.

The action was on certain bonds and coupons thereto attached, issued by the county of Sac, in the State of Iowa. The facts are sufficiently stated in the opinion of the court. The defendant obtained judgment, and the plaintiff brought the case here.

FIELD, J.<sup>2</sup> This was an action on four bonds of the county of Sac, in the State of Iowa, each for \$1,000, and four coupons for interest, attached to them, each for \$100. The bonds were issued in 1860, and were made payable to bearer, in the city of New York,

<sup>1</sup> As to the right of a defendant who has interposed a defense by way of recoupment, set-off or counterclaim, on which he is successful, see *Mendell v. Steel*, 8 M. & W. 858; *Burnett v. Smith*, 4 Gray (Mass.), 50; *Star Glass Co. v. Morey*, 108 Mass. 570; *Osborne v. Williams*, 39 Minn. 353, 40 N. W. 165; 2 Black, Judgments, 2d ed., sec. 763. — ED.

<sup>2</sup> A part of the opinion is omitted, together with the dissenting opinion of Clifford, J. — ED.

in the years 1868, 1869, 1870, and 1871, respectively, with annual interest at the rate of ten per cent a year.

To defeat this action, the defendant relied upon the estoppel of a judgment rendered in favor of the county in a prior action brought by one Samuel C. Smith upon certain earlier maturing coupons on the same bonds, accompanied with proof that the plaintiff Cromwell was at the time the owner of the coupons in that action, and that the action was prosecuted for his sole use and benefit.

The questions presented for our determination relate to the operation of this judgment as an estoppel against the prosecution of the present action, and the admissibility of the evidence to connect the present plaintiff with the former action as a real party in interest.

In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties, and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action. . . .

It is not believed that there are any cases going to the extent that because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action.

Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defence in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction. A judgment by default only admits for the purpose of the action the legality of the demand or claim in suit: it does not make the allegations of the declaration or complaint evidence in an action upon a different claim. The declaration may contain different statements of the cause of action in different counts. It could hardly be pretended that a judgment by default in such a case would make the several statements evidence in any other proceeding. *Boyleau v. Rutlin*, 2 Exch. 665, 681; *Hughes v. Alexander*, 5 Duer, 493. . . .

If, now, we consider the main question presented for our determination by the light of the views thus expressed and the authorities cited, its solution will not be difficult. It appears from the findings in the original action of *Smith*, that the county of *Sac*, by a



vote of its people, authorized the issue of bonds to the amount of \$10,000, for the erection of a court-house; that bonds to that amount were issued by the county judge, and delivered to one Meserey, with whom he had made a contract for the erection of the court-house; that immediately upon receipt of the bonds the contractor gave one of them as a gratuity to the county judge; and that the court-house was never constructed by the contractor, or by any other person pursuant to the contract. It also appears that the plaintiff had become, before their maturity, the holder of twenty-five coupons, which had been attached to the bonds; but there was no finding that he had ever given any value for them. The court below held, upon these findings, that the bonds were void as against the county, and gave judgment accordingly. The case coming here on writ of error, this court held that the facts disclosed by the findings were sufficient evidence of fraud and illegality in the inception of the bonds to call upon the holder to show that he had given value for the coupons; and, not having done so, the judgment was affirmed. Reading the record of the lower court by the opinion and judgment of this court, it must be considered that the matters adjudged in that case were these: that the bonds were void as against the county in the hands of parties who did not acquire them before maturity and give value for them, and that the plaintiff, not having proved that he gave such value, was not entitled to recover upon the coupons. Whatever illegality or fraud there was in the issue and delivery to the contractor of the bonds affected equally the coupons for interest attached to them. The finding and judgment upon the invalidity of the bonds, as against the county, must be held to estop the plaintiff here from averring to the contrary. But as the bonds were negotiable instruments, and their issue was authorized by a vote of the county, and they recite on their face a compliance with the law providing for their issue, they would be held as valid obligations against the county in the hands of a *bona fide* holder taking them for value before maturity, according to repeated decisions of this court upon the character of such obligations. If, therefore, the plaintiff received the bond and coupons in suit before maturity for value, as he offered to prove, he should have been permitted to show that fact. There was nothing adjudged in the former action in the finding that the plaintiff had not made such proof in that case which can preclude the present plaintiff from making such proof here. The fact that a party may not have shown that he gave value for one bond or coupon is not even presumptive, much

less conclusive, evidence that he may not have given value for another and different bond or coupon. The exclusion of the evidence offered by the plaintiff was erroneous, and for the ruling of the court in that respect the judgment must be reversed and a new trial had.

Upon the second question presented, we think the court below ruled correctly. Evidence showing that the action of Smith was brought for the sole use and benefit of the present plaintiff was, in our judgment, admissible. The finding that Smith was the holder and owner of the coupons in suit went only to this extent, that he held the legal title to them, which was sufficient for the purpose of the action, and was not inconsistent with an equitable and beneficial interest in another.

*Judgment reversed, and cause remanded for a new trial.*<sup>1</sup>

### GARDNER v. BUCKBEE.

SUPREME COURT OF NEW YORK. 1824.

[Reported 3 Cowen, 120.]

*Curia*, per WOODWORTH, J.<sup>2</sup> This is a writ of error to the Common Pleas of the city of New York. Buckbee, plaintiff in the Court below, commenced an action against Gardner, on a promissory note. The defendant pleaded the general issue, and gave notice of special matter, that the note was given in part payment for a vessel called the Tiger, sold to the defendant and others, and alleged fraud by the plaintiff in the sale; the vessel being at the time rotten and unseaworthy, and that known to the plaintiff. At the trial the plaintiff admitted, that the note was one of two promissory notes, for the same amount, given by the defendant and two others, as the consideration upon the sale of the vessel.

The defendant offered to prove, in bar of the plaintiff's demand, that the plaintiff impleaded the defendant, in the Marine Court of the city of New York, upon a promissory note, bearing even date, and for the same amount as the one now in question, signed by the same parties, and given for the consideration money; that, upon the trial in the Marine Court, the fraud of the plaintiff in the sale

<sup>1</sup> See *Radford v. Myers*, 231 U. S. 725, 58 L. ed. 454, 34 S. Ct. 249; *Harmon v. Auditor of Public Accounts*, 123 Ill. 122, 13 N. E. 161. See also *Cote v. New Eng. Nav. Co.*, 213 Mass. 177, 99 N. E. 972. — ED.

<sup>2</sup> Only the opinion of the court is here given. — ED.

was the only point in question; and that judgment had been rendered in that Court in favour of the defendant, on the ground that the sale was fraudulent. The plaintiff objected to the testimony, because the judgment had not been pleaded, or notice given; and that the note on which the present suit was brought, is a different instrument from that declared on in the Marine Court. The Judge declared the evidence was not admissible, in that stage of the cause, but might be offered, after proof to the jury of the fraud, and in support thereof, to which the defendant excepted.

The defendant, then, in proof of the fraud, offered in evidence the record of the judgment in the Marine Court, in favour of the defendant, on the other note. By the record it appeared that the defendant pleaded the general issue, and gave notice of a total failure of the consideration. J. B. Scott, one of the Justices of that Court, testified that the matters directly in question before the Marine Court, were, the unseaworthiness of the vessel at the time of sale, and the knowledge of that fact by the plaintiff; it not being disclosed at the time of sale to the defendant.

The counsel for the defendant then insisted, that the record was a judgment of a Court of concurrent jurisdiction, upon the same matters in question in the Court below, and was conclusive evidence in favour of the defendant to entitle him to a verdict. The Judge decided, and charged the jury, that the matters given in evidence by the defendant, were not, in themselves, sufficient to bar the plaintiff's action, but were entitled to the serious consideration of the jury, and were to be taken by them in conjunction with the other evidence of fraud offered in proof. The jury found a verdict for the plaintiff. The defendant excepted to the opinion.

It appears clearly that the question of fraud was tried between the parties, in the Marine Court, on one of the notes given in part payment of the vessel. That Court had concurrent jurisdiction. The question is, whether the judgment thus obtained is not a conclusive bar to a recovery in this cause? The law is well settled, that the judgment of a Court of concurrent jurisdiction, directly upon the point, is, as a plea in bar, or evidence, conclusive between the same parties, upon the same matter directly in question in another Court. This was the rule laid down by De Grey, Chief Justice, in delivering judgment in the *Duchess of Kingston's case*. (11 State Tri. 261. 1 Phil. Ev. 223. 1 Peters' Rep. 202, Cir. Court U. S.) I am not aware that it has been departed from by our Courts. The general principle does not appear to be con-

troverted by the counsel for the defendant in error; but it is urged that the judgment in the Marine Court does not affirm any particular fact in issue in this cause, but is general and indefinite; and that, from the language of the record, it cannot be inferred whether the two cases were founded on the same or a different state of facts. It is true, the record merely proves the pleadings, and that judgment was rendered for the defendant. Without other proof it would not make out the defence. The record shows that it was competent, on the trial, to establish the fraud of the plaintiff. Whether fraud was made out, and whether that was the point upon which the decision was founded, must necessarily be proved by evidence extrinsic the record. To do so is not inconsistent with the record, nor does it impugn its verity. The jury must have passed on the fraud. It was directly in question. Scott testifies that the unseaworthiness was not disclosed at the time of sale to the defendant. The inquiry, then, was solely directed to the question, was the vessel unseaworthy, and had the plaintiff knowledge of that fact when he sold? By the finding of the jury, both propositions are affirmed. The judgment became conclusive between these parties, on these points, and is an effectual bar to the action to recover the residue of the consideration money. It is unnecessary to consider whether the record was admissible in evidence under the general issue, without notice. It was admitted, and no exception was taken on that ground. The effect ascribed to it seems to be the material question in the case. It is in general true, that, under *non assumpsit*, most matters in discharge of the action, which show that at the time of the commencement of the suit the plaintiff had no cause of action, may be taken advantage of (1 Chit. 472). This rule may appear somewhat arbitrary, as the object of pleading is to apprise the adverse party of the grounds of defence. It is, however, peculiar to this action, although, as Chitty observes, not according with the logical precision which usually prevails in pleadings. The Judge ought to have charged the jury, that if, from the evidence, they were satisfied that the matters in question had been passed upon in the Marine Court, the record was conclusive against the plaintiff's right to recover.

I am of opinion that the exceptions are well taken, and that the judgment ought to be reversed.

*Judgment reversed.*<sup>1</sup>

<sup>1</sup> See *Hanna v. Read*, 102 Ill. 596; *Wright v. Griffey*, 147 Ill. 496, 35 N. E. 732; *People's Water Co. v. Pittston*, 241 Pa. 208.

The judgment is a bar although, by reason of the small amount in dispute, it



## HIBSHMAN v. DULLEBAN.

SUPREME COURT OF PENNSYLVANIA. 1835.

[Reported 4 *Watts*, 183.]

GIBSON, C. J.<sup>1</sup> The defendants having pleaded a release to the plaintiff's declaration for a legacy and the plaintiff having replied *per fraudem*, the defendants rejoin that the release was exhibited by them in the orphan's court, and allowed by that court as a decisive bar to exceptions taken by the plaintiff to their administration account; and the question raised by the demurrer is, whether the validity of the release has passed *in rem judicatam*. The law of the case, with its distinctions, has been compressed into the dimensions of a nutshell, by Chief Justice De Grey, in the Duchess of Kingston's case, 11 St. Tr. 261; and though the passage is a trite one, yet as it could not otherwise be so well expressed, it is proper to repeat it in his own words. "From the variety of cases in respect to judgments being given in evidence," said the chief justice, "these two distinctions seem to follow as being generally true: the first, that the judgment of a court of concurrent jurisdiction directly upon the point, is, as a plea, a bar — or as evidence, conclusive, between the same parties on the same matter directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction directly upon the point, is in like manner conclusive upon the same matter between the same parties coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction, is evidence of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." This brief but comprehensive summary furnishes a rule for every case that any complication of circumstances can produce. Now, did the question of fraud come before the orphan's court directly or incidentally? Not directly certainly; for that court had jurisdiction of it but incidentally, and not to entertain an action whose immediate object should be to ascertain the fact. In Blackham's case, 1 Salk. 290, the defendant proved that the goods, for the conversion of which the action was brought, had belonged to Mrs. Blackham, whose administrator could not be reviewed by a court of appellate jurisdiction. *Johnson Company v. Wharton*, 152 U. S. 252, 38 L. ed. 429, 14 S. Ct. 608.

A judgment by default is conclusive as to the matters necessary to support the judgment. *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 39 L. ed. 859, 15 S. Ct. 733. — Ed.

<sup>1</sup> Only the opinion of the court is given. — Ed.

he then was; to rebut which, the plaintiff proved that he was her husband; whereupon the defendant contended that the marriage was conclusively negatived by the grant of administration to himself, in preference to the plaintiff, her pretended husband. But lord Holt said, that though a matter directly determined by the sentence could not be gainsaid, yet that the principle has regard but to a point directly tried, and not to a matter collaterally inferable from it. The same principle was recognized by the king's bench, in *Clues v. Bathurst*, Ca. Temp. Hardw. 12. The case of *Rex v. Vincent*, Stra. 481, in which it was held, that the production of a probate by a prisoner indicted for forging a will, is conclusive for him, has been repeatedly overruled. And the judgment must not only have been direct, but conclusive of the matter adjudged, in the court where it was rendered; for, as is justly remarked by Mr. Starkie, part two, section sixty-five, if it did not decide the point there, it ought not to decide it elsewhere. On all these grounds the decree of the orphan's court was incompetent to affect the plaintiff in his common law action. The validity of the release was drawn into contest incidentally; and the point being thus incidentally decided against him, can no more prejudice his title in another court, than can the decision of a surrogate or register prejudice the title of an unsuccessful claimant of administration to the estate of a decedent. Again, the point was not actually, or at least necessarily, decided. The plaintiff's exceptions to the administration account, were also the exceptions of Henry Dulleban's trustees; and whether the release were good or bad, was a question whose decision could not supplant a decision of them on the merits. It did not supplant it; and the gratuitous determination of a point involving the question of fraud, which had no effect there, ought to have no effect here, especially to deprive the plaintiff of a trial by jury.

*Judgment affirmed.*

<sup>1</sup> In *Misir Raghobardial v. Rajah Sheo Baksh Singh*, L. R. 9 Indian Appeals 197, p. 203 the court says (quoting from a prior decision) that "in order to make the decision of one Court final and conclusive in another Court, it must be a decision of a Court which would have had jurisdiction over the matter in the subsequent suit in which the decision is given in evidence as conclusive." See *Duchess of Kingston's Case*, 10 How. St. Tr. 355, 537, 3 Smith, Leading Cases, 9th Am. ed., 1998; 1 Van Fleet, Former Adjudication, secs. 2-5.—Ed.

## DOYLE v. GORE.

SUPREME COURT OF MONTANA. 1895.

[Reported 15 *Montana*, 212.]

PEMBERTON, C. J. This is an action by plaintiff to recover damages claimed to have been sustained by him on account of an assault and battery alleged to have been committed by defendant upon plaintiff.

The case was tried with a jury, and a verdict rendered in favor of plaintiff for five hundred dollars. Judgment was entered thereon for said amount. From this judgment, and an order of the court denying a new trial, the defendant appeals.

It appears that, after the commission of the alleged assault and battery, the defendant was arrested therefor, and tried and convicted before a justice of the peace. In the trial of this case for damages resulting from said assault and battery, the court, over the objection of defendant, permitted the plaintiff to introduce in evidence the transcript of the justice's docket, who tried the criminal case against the defendant. This is assigned as error.

In 1 *Greenleaf on Evidence*, fifteenth edition, section 537, it is said: "Upon the foregoing principles, it is obvious that, as a general rule, a verdict and judgment in a criminal case, though admissible to establish the fact of the mere rendition of the judgment, cannot be given in evidence in a civil action, to establish the facts on which it was rendered."

In section 538 the same author, speaking of a case exactly like the one at bar, says: "But if he were convicted of the offense, and then is sued in trespass for the assault, the record in the former case would not be in evidence to establish the fact of the assault; for, as to matters involved in the issue, it is *res inter alios acta*." (And see authorities cited.)

The defendant may have been convicted upon perjured or incompetent testimony, or by collusion, or his conviction may have been the result of prejudice on the part of the justice or the jury. In this case the introduction of this evidence may have been very prejudicial to the defendant. Whether or not the defendant committed the assault and battery alleged was an issue in the case. By the justice's transcript the plaintiff claims that the assault and battery was shown, leaving the jury to determine only the amount of damage plaintiff had sustained by reason thereof. The court gave no instruction as to the purpose of this evidence. Nor does

the record disclose any particular purpose for which it was admitted. But accepting plaintiff's statement in his brief as to the purpose of its introduction, we are of opinion that it was error to admit it in this case. It certainly did prove, or tend to prove, the facts upon which judgment of the justice was rendered. Such being the intended purpose and effect of the evidence, its admission was error.

The judgment is reversed and cause remanded for a new trial.

*Reversed.*<sup>1</sup>

DE WITT, J., and HUNT, J., concur.

RIVERSIDE LAND & IRRIGATING COMPANY v.  
JENSEN, Executrix, *et al.*

SUPREME COURT OF CALIFORNIA. 1895.

[Reported 108 *California*, 146.]

THE defendant in the present action was executrix of the last will of Cornelius Jensen, deceased, and the devisee thereunder of the land the title to which was sought to be quieted. The further facts are stated in the opinion of the court.

VAN FLEET, J.<sup>2</sup> Action to quiet title. Plaintiff had judgment, from which and an order denying her motion for a new trial defendant appeals.

The objection of defendant to the introduction in evidence of the judgment-roll in the action of Riverside Land & Irrigating Company v. Cornelius Jensen was properly overruled. That was an action brought by the plaintiff here against the testator and predecessor in interest of this defendant to quiet plaintiff's title to certain lands, including the premises in controversy in this action, and in which final judgment was entered quieting plaintiff's title to the land in suit. It was not required of plaintiff to plead said judgment in order to be entitled to prove it. The complaint was in the usual form and was sufficient (*Rough v. Simmons*, 65 Cal. 227; *Heeser v. Miller*, 77 Cal. 192; *Castro v. Barry*, 79 Cal. 447); and

<sup>1</sup> Compare *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582; *Luther v. Shaw*, (Wis., 1914) 147 N. W. 18.

The judgment is a bar as to those who, though not parties to the record, are nevertheless real parties. *Souffront v. La Compagnie des Suereries de Porto Rico*, 217 U. S. 475, 54 L. ed. 846, 30 S. Ct. 608; *Weld v. Clarke*, 209 Mass. 9, 95 N. E. 651. — ED.

<sup>2</sup> A part of the opinion is omitted. — ED.



such an allegation would have been improper, as it is never necessary in such an action to plead derangement of title. That is matter of evidence purely. While as a general rule it may be necessary to plead estoppel by former judgment, that rule does not apply when, as under our system, no opportunity is afforded the plaintiff to plead it. It had no proper place in the complaint, but plaintiff could not be precluded from the benefit of it as matter of evidence on that ground. He was entitled to give it in evidence with the same effect as if given an opportunity to plead it specially. *Clink v. Thurston*, 47 Cal. 27; *Wixson v. Devine*, 67 Cal. 345. . . .

*Judgment and order affirmed.*

HARRISON, J., and GAROUTTE, J., concurred.

### DULL v. BLACKMAN.

SUPREME COURT OF THE UNITED STATES. 1898.

[Reported 169 *United States*, 243.]

THE facts in this case are as follows: On June 25, 1889, plaintiff in error, Daniel Dull, being the owner of the tract of land in controversy, conveyed the same by warranty deed executed by himself and wife to John E. Blackman. Blackman, on August 2, 1889, made a deed of the same land to George F. Wright as security for moneys to be advanced by Wright. On the 29th of February, 1892, Blackman commenced this suit in the District Court of Pottawattamie County, Iowa, to compel a reconveyance by Wright on the ground of his failure to advance any money. Prior thereto, and on January 30, 1892, Blackman had executed a deed of the land to Edward Phelan, which conveyance was at first conditional but by agreement signed by the parties on September 15, 1892, was made absolute. On the 17th of September, 1892, Phelan filed his petition of intervention, setting forth his rights in the matter under the deed of January 30 and the agreement of September 15, and also making plaintiffs in error and others defendants, alleging that they claimed certain interests in the property, and praying a decree quieting his title as against all. On January 24, 1893, plaintiff's counsel withdrew his appearance for Blackman, and, upon his application, was allowed to prosecute the action in the name of Blackman for and in behalf of Phelan, the intervenor. On February 2, 1893, the plaintiffs in error appeared in the suit and filed an answer denying all the allegations in plaintiff's petition and

in the petition of intervention. On the 15th of that month they filed an amended answer and a cross petition, in which they set up that Blackman had obtained his deed from them by certain false representations, and that a suit was pending in the Supreme Court of the State of New York, in which Daniel Dull was plaintiff, and Blackman, Wright, Phelan and others were defendants, in which the same issues were made and the same relief sought as in the case at bar. On May 29 they filed an amendment to their answer and cross petition setting forth that the case pending in the Supreme Court of New York had gone to decree, and attached a copy of that decree. The suit in the Supreme Court of the State of New York was commenced on the 3d of November, 1892. Blackman was served personally within the limits of that State, but the other defendants therein, Wright, Phelan and Duffie their counsel, were served only by delivering to them in Omaha, Nebraska, a copy of the complaint and summons. No appearance was made by them. Notwithstanding which the decree was entered against them as against Blackman, and was a decree establishing the title of Daniel Dull, setting aside the deed made by him and his wife to Blackman, and enjoining the several defendants from further prosecuting the action in the Iowa court. After certain other pleadings and amendments thereto had been made the case in the District Court of Pottawattamie County, Iowa, came on for hearing, and upon the testimony that court entered a decree quieting Phelan's title to the land as against any and all other parties to the suit, subject, however, to certain mortgage interests which were recognized and protected, but which are not in any way pertinent to this controversy between Dull and wife and the defendants in error. On appeal to the Supreme Court of the State such decree was, on January 21, 1896, affirmed, from which judgment of affirmance plaintiffs in error have brought the case here.

BREWER, J.<sup>1</sup> The contention of the plaintiffs in error, and in it is the only question of a Federal nature presented by the record, is that the courts in Iowa did not give that full faith and credit to the decree rendered in the Supreme Court of the State of New York to which under the Constitution of the United States it was entitled. From the foregoing statement of facts it appears clearly that although the suit in the Iowa court was originally commenced by Blackman, and though his name was, under the practice prevailing in Iowa, never dropped from the title of the case, it was by reason

<sup>1</sup> A part of the opinion is omitted. — Ed.

of the intervention of Phelan and the orders of the court simply prosecuted in his name for the benefit of Phelan, the intervenor; that this intervention of Phelan, and his petition in support thereof, making the plaintiffs in error and others defendants thereto, was filed on the 17th of September, 1892, nearly two months before the commencement of the suit in New York. It also appears that while Blackman, Phelan, Wright and others were named as parties defendant to the suit in New York, Blackman was the only one served within the territorial jurisdiction, and the only one appearing in that court. The other defendants were attempted to be brought in by service of summons in the State of Nebraska, and never entered any appearance in the suit. It is true the decree in the Supreme Court of the State of New York was entered before the trial of this case in the District Court of Iowa, and the record of the proceedings in the New York court was in evidence at the trial in the Iowa court. It further appears from the findings of fact made by the trial court in Iowa, and sustained by the Supreme Court of that State, that the entire right and title had passed from Blackman to Phelan in September, 1892, nearly two months before the commencement of the suit in New York.

Upon these facts we remark that as the land, the subject-matter of this controversy, was situate in Iowa, litigation in respect to its title belonged properly to the courts within that State, *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 107, although if all the parties interested in the land were brought personally before a court of another State, its decree would be conclusive upon them and thus in effect determine the title. The suit in New York was one purely *in personam*. Any decree therein bound simply the parties before the court and their privies, and did not operate directly upon the lands. . . .

We remark again that while a judgment or decree binds not merely the party or parties subject to the jurisdiction of the court but also those in privity with them, yet that rule does not avail the plaintiffs in error, for Phelan acquired his rights prior to the institution of the suit in New York and was therefore not privy to that judgment.

"It is well understood, though not usually stated in express terms in works upon the subject, that no one is privy to a judgment whose succession to the rights of property thereby affected, occurred previously to the institution of the suit. A tenant in possession prior to the commencement of an action of ejectment cannot therefore be lawfully dispossessed by the judgment unless



made a party to the suit. . . . No grantee can be bound by any judgment in an action commenced against his grantor subsequent to the grant, otherwise a man having no interest in property could defeat the estate of the true owner. The foreclosure of a mortgage, or of any other lien, is wholly inoperative upon the rights of any person not a party to the suit, whether such person is a grantee, judgment creditor, attachment creditor, or other lienholder." Freeman on Judgments, (1st ed.,) § 162.

As Phelan was not brought within the jurisdiction of the New York court, and as the suit in that court was instituted nearly two months after he had acquired full title to the real estate, the decree of that court did not bind him as a party, nor bind him as in privity with Blackman, his grantor. The Supreme Court of Iowa did not err in so holding.

The decree is

*Affirmed.*<sup>1</sup>

BRIGHAM v. FAYERWEATHER & another.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1886.

[Reported 140 *Massachusetts*, 411.]

BILL IN EQUITY, filed May 21, 1884, to have declared void a mortgage deed executed by Azubah Brigham, the plaintiff's testator, on the ground that said Azubah Brigham at the date of the execution of said deed was not of sufficient mental capacity to execute the deed. The bill alleged, and the answer admitted, that the plaintiff derived his title from the will of Azubah Brigham. The case was heard before Aldrich, J., who allowed a bill of exceptions, in substance as follows:

The following issue was submitted to the jury: Was Azubah Brigham of sufficient mental capacity, at the time the mortgage deed referred to in the bill was executed, to transact the business of executing such deed?

<sup>1</sup> Doctor Jack Pot Min. Co. v. Marsh, 216 Fed. 261, *accord*.

PURCHASERS PENDENTE LITE. In the absence of statute, a purchaser of property pending suit in which the title thereto is involved takes subject to the judgment or decree which may be rendered in the suit against the vendor. See *Sprague v. Stevens*, (R. I., 1914) 91 Atl. 43, and cases cited; 2 Black, Judgments, 2d ed., sec. 550; 2 Van Fleet, Former Adjudication, secs. 539-550.

Statutes now generally provide for filing a notice in case of actions brought to recover a judgment affecting real property. See N. Y. C. C. P., sec. 1670; *Jorgenson v. Minneapolis & St. L. Ry. Co.*, 25 Minn. 206. — ED.



The mortgage deed was executed on June 15, 1882. The mortgagor died on December 6, 1883, leaving a last will, executed on October 11, 1882, by the provisions of which the plaintiff was made residuary devisee and legatee, and he was also one of the executors of the will.

The defendants offered evidence tending to show that the mental capacity of the mortgagor was no less on June 15, 1882, than on October 11, 1882.

The defendants offered in evidence the petition of the plaintiff for the probate of said will in the Probate Court for the county of Worcester; and as evidence of the mental soundness and capacity of the mortgagor at the date of the will, four months after the execution of the mortgage, they offered the adjudication of the Probate Court admitting the will to probate. The evidence was excluded, not on the ground that the date of the execution of the will was too remote from the date of the deed, but on the ground that the adjudication of the Probate Court was not admissible for the purpose for which it was offered, on the issue before the jury; and the defendants excepted.

Dr. William Curtis, one of the executors of the will, was a witness for the plaintiff. He testified that he was the family physician of Mrs. Brigham, the mortgagor, to the time of her death. He testified to various facts, and to his opinion that she was disqualified from doing such business as the execution of said mortgage deed at the time she signed it, by reason of her mental unsoundness. The first-named defendant, after the appointment of Curtis as executor, in April or May, 1884, had a talk with him about the said mortgage. The defendants offered to show by the evidence of said defendant, that, in said talk in May or April, 1884, Curtis did not state or contend, and never had stated or contended to him, prior to the bringing of this suit, that the mortgagor was incompetent to execute this mortgage when it was made. This evidence was excluded, and the defendants excepted.

The jury answered the question submitted to them in the negative; and the defendants alleged exceptions.

HOLMES, J. A judgment *in rem* is an act of the sovereign power; and, as such, its effects cannot be disputed, at least within the jurisdiction. If a competent court declares a vessel forfeited, or orders it sold free of all claims, or divorces a couple, or establishes a will under statutes like our Pub. Sts. c. 127, § 7, a paramount title is passed, the couple is divorced, the will is established, as against all the world, whether parties or not, because the

sovereign has said that it shall be so. *Hughes v. Cornelius*, 2 Show. 232; *S. C. T. Raym.* 473; *Skin.* 59; *Carth.* 32. *Noell v. Wells*, 1 Lev. 235. *Scott v. Shearman*, 2 W. Bl. 977. *The Helena*, 4 Rob. (Adm.) 3. *Leonard v. Leonard*, 14 Pick. 280. *McClurg v. Terry*, 6 C. E. Green, 225. But the same is true when the judgment is that A recover a debt of B. The public force is pledged to collect the debt from B, and no one within the jurisdiction can oppose it. And it does not follow in the former case any more than in the latter, nor is it true, that the judgment, because conclusive on all the world in what we may call its legislative effect, is equally conclusive upon all as an adjudication of the facts upon which it is grounded. On the contrary, those judgments, such as sentences of prize courts, to which the greatest effect has been given in collateral proceedings, are said to be conclusive evidence of the facts upon which they proceed only against parties who were entitled to be heard before they were rendered. *The Mary*, 9 Cranch, 126, 146. *Salem v. Eastern Railroad*, 98 Mass. 431, 449. *Baxter v. New England Ins. Co.*, 6 Mass. 277, 286. *Whitney v. Walsh*, 1 Cush. 29.

We may lay on one side, then, any argument based on the misleading expression that all the world are parties to a proceeding *in rem*. This does not mean that all the world are entitled to be heard, and as strangers in interest are not entitled to be heard, there is no reason why they should be bound by the findings of fact, although bound to admit the title or status which the judgment establishes.

Still, the cases last cited show that some judgments *in rem* are conclusive evidence of the facts adjudicated, in favor of a stranger, as against a party. And if the analogy is to be applied to all judgments which create or change a status or a title, it would apply here. For the plaintiff was a party to the decree establishing the will, and that decree necessarily proceeded on the ground that the testator possessed sufficient capacity to make the will. But these cases cannot be taken to lay down a general principle.

The reasons given for the decisions are not that the conclusion follows as a necessary effect of judgments *in rem* merely as such, but are special reasons of convenience or construction. In *The Mary*, 9 Cranch, 126, 145, the doctrine as to sentences of prize courts is said to rest on "the propriety of leaving the cognizance of prize questions exclusively to courts of prize jurisdiction; the very great inconvenience, amounting nearly to an impossibility, of fully investigating such cases in a court of common law; and the

impropriety of revising the decisions of the maritime courts of other nations, whose jurisdiction is coördinate throughout the world." In *Baxter v. New England Ins. Co.*, 6 Mass. 277, 300, and *Robinson v. Jones*, 8 Mass. 536, 540, the effect of a sentence in a subsequent action on a policy of insurance is referred to the settled construction of mercantile contracts. In *Lothian v. Henderson*, 3 B. & P. 499, 545, the doctrine seems to be thought to stand on practice and authority, rather than on principle. See *Castrique v. Imrie*, L. R. 4 H. L. 414, 434.

The general principle is stated with substantial correctness by Sir James F. Stephen, in his work on Evidence, art. 42: "Statements contained in judgments as to the facts upon which the judgment is based are deemed to be irrelevant as between strangers, or as between a party, or privy, and a stranger, except in the case of judgments of courts of admiralty condemning a ship as prize," and some other judgments of a kindred nature.

Apart from precedent, there seems to be no satisfactory ground for treating the probate of a will as evidence of the testator's mental capacity on a collateral issue. For except in the comparatively small number of cases where the probate of the will is opposed, the investigation of the fact is necessarily only formal. Still less do we see why, if the probate is not evidence against a party who had no right to be heard, he should hold the executor bound by it when he himself is free. Ordinarily, estoppels by judgment are mutual. The fact can be tried in the Superior Court as well as in the Probate Court, and was actually tried in this very case. Thus the chief reason offered for the effect of prize sentences is removed.

One or two cases cited by the defendant may need a word of explanation. It has been held, in a suit by an administrator, that letters of administration are conclusive proof of the intestate's death, unless the defendant pleads in abatement. *Newman v. Jenkins*, 10 Pick. 515. And elsewhere it has been decided, in a suit where the plaintiff's title was derived from an administrator's sale, that the letters are *prima facie* evidence of the death. *Jeffers v. Radcliff*, 10 N. H. 242. *Tisdale v. Connecticut Ins. Co.*, 26 Iowa, 170; S. C. 28 Iowa, 12. But in these cases the letters are not introduced as evidence on a collateral issue. They are the necessary foundation of the plaintiff's title. They are not put in to prove the death, but the death is denied in order to invalidate the letters. The fact of death is immaterial, except as bearing on the jurisdiction of the court to issue them. It may well be held that,



where the question comes up in this way, such a decree will be presumed, *prima facie*, to have been within the jurisdiction of the court that made it, so far as this fact is concerned, although it has been held otherwise in England. *Moons v. De Bernales*, 1 Russ. 301, 307. See *Thompson v. Donaldson*, 3 Esp. 63. But it is entirely consistent with the New Hampshire and Iowa decisions to hold that, in collateral proceedings, the issue of letters of administration is not even *prima facie* evidence of death. *Carroll v. Carroll*, 60 N. Y. 121. *Mutual Benefit Ins. Co. v. Tisdale*, 91 U. S. 238. See *Blackham's case*, 1 Salk. 290; *French v. French*, Dick. 268; *Spencer v. Williams*, L. R. 2 P. & D. 230. These cases very strongly sustain the conclusion which we have reached. In the case at bar, the plaintiff's title under the will was admitted by the answer, and if it had not been, the testator's sanity or insanity did not affect it, because it did not affect the jurisdiction of the court.

If the defendant as well as the plaintiff had been a party to the probate of the will, a different question would arise. See *Barrs v. Jackson*, 1 Phil. 582, reversing S. C. 1 Y. & C. Ch. 585; *Doglioni v. Crispin*, L. R. 1 H. L. 301, 311, 314; *Burlen v. Shannon*, 99 Mass. 200, 203; *Morse v. Elms*, 131 Mass. 151, 152. But the defendant was not a party in the sense that he was entitled to be heard, or to take an appeal, and unless he had that right, he was not concluded by the adjudication of facts, as has been shown.

It is suggested that the plaintiff's petition presenting the will for probate was competent as an admission. But we do not think that any question except the effect of the adjudication appears by the exceptions to have been presented to the court, or to have been ruled upon by it, even if the petition would have been admissible on that ground, which we do not intimate. See *Page v. Page*, 15 Pick. 368.

The bill of exceptions does not show that the testimony of Fayerweather was improperly rejected. The mere fact that Dr. Curtis had had a talk about the mortgage does not show that the talk was of such a nature as to call for a denial of the mortgagor's capacity, and therefore the fact that he did not deny it would not tend to contradict or impeach his testimony at the trial that the mortgagor was incompetent. *Perry v. Breed*, 117 Mass. 155, 165.

*Exceptions overruled.*<sup>1</sup>

<sup>1</sup> See *Ballantyne v. Mackinnon*, [1896] 2 Q. B. 455. — ED.













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